as Exhibit A is a true and correct copy of the letter dated June 6, 1984, and attached hereto as Exhibit B is a true and correct copy of the envelope in which the letter was received.

12. According to the terms of the letter, the letter was intended to be a formal modification of the approved plan of operation for the Muskego Landfill site operated by Waste Management of Wisconsin, Inc. Upon information and belief, according to the second to the last paragraph on page 12 of the letter, the Department of Natural Resources intended the letter to be final agency action reviewable pursuant to §§ 227.15 and 227.16, Wis. Stats.

13. The Muskego Sanitary Landfill site is in compliance with all regulations which were promulgated and in effect at the time the area known as the Southeast Area was licensed and received approval for its plan of operation, and the Muskego Landfill site is also in compliance with all rules and regulations promulgated and in effect at the time the plan of operation was approved for the currently active area of the landfill site.

14. At no time prior to issuing Exhibit A, did the Wisconsin Department of Natural Resources provide the petitioner with notice that the Department intended to modify the Approved Plan of Operation for the Muskego Sanitary Landfill, and at no time did the Wisconsin Department of Natural Resources provide the petitioner with a meaningful opportunity to be heard with respect to the modification of the Approved Plan of Operation for the Muskego Sanitary Landfill.

15. In issuing the letter dated June 6, 1984, the Wisconsin Department of Natural Resources failed to make

any findings of fact, failed to make any conclusions of law, and upon information and belief, the individuals who signed and issued such letter were not authorized to take such action on behalf of the Wisconsin Department of Natural Resources and were not appropriately designated by the Secretary of the Wisconsin Department of Natural Resources to take action on his behalf. In taking such actions, the Wisconsin Department of Natural Resources failed to follow its own procedures and the procedures required to be followed by the Wisconsin Department of Natural Resources under the Wisconsin Statutes as a condition precedent to the exercise of its authority.

16. Despite the express language of § 144.44(3)(d), Wis. Stats. (1977), and § 144.44(3)(d), Wis. Stats. (1981-82), the letter dated June 6, 1984, fails to set forth any of the findings required by the referenced statute as a condition precedent to a modification to the Approved Plan of Operation approved on November 28, 1979, and due to the failure of the Wisconsin Department of Natural Resources to make such findings, the letter exceeds the authority delegated to the Wisconsin Department of Natural Resources and limited by § 144.44(3)(d), Wis. Stats. (1977), and § 144.44(3)(d), Wis. Stats. (1981-82).

17. The letter dated June 6, 1984, is void and unenforceable for the reason that the letter attempts to incorporate conditions into a previously approved Plan of Operation which are not set forth in any standard for design, construction, sanitation, operation or maintenance of a sanitary landfill site which has been formally promulgated by the Wisconsin Department of Natural Resources under the authority granted to it under §§ 144.435 or

144.62, Wis. Stats. The letter therefore exceeds the authority delegated to the Wisconsin Department of Natural Resources under § 144.44(3)(c), Wis. Stats.

18. Upon information and belief, the same individuals who considered any evidence relied upon by the Department of Natural Resources, also commented upon such evidence and also recommended the issuance of the letter dated June 6, 1984. Such individuals also drafted the letter and made the final decision to issue the letter to the petitioner, and the participation of those individuals in both the investigatory and adjucatory functions of the Wisconsin Department of Natural Resources violates the petitioner's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

19. The failure of the Wisconsin Department of Natural Resources to provide the petitioner with notice and a meaningful opportunity to be heard prior to the issuance of the letter violates the petitioner's rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

20. Upon information and belief, the letter dated June 6, 1984, is not supported by substantial evidence and is not supported by a clear preponderance of the credible evidence.

WHEREFORE, Waste Management of Wisconsin, Inc. respectfully requests that the Court grant it the following relief:

1. Declaring that the letter dated June 6, 1984, to be void and unenforceable;

2. In the alternative, remanding this matter to the Department of Natural Resources for a contested case hearing to be conducted as a Class 2 proceeding;

3. Awarding the petitioner its taxable costs and disbursements; and

4. Granting the petitioner such further relief, whether at law or equity, as may be determined by the Court to be appropriate.

Dated at Milwaukee, Wisconsin, this 13th day of July, 1984.

FRIEBERT, FINERTY & ST. JOHN

/s/ By: William S. Roush, Jr.
Attorneys for Plaintiff

P.O. ADDRESS:

710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

4624/50

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

WASTE MANAGEMENT OF WISCONSIN, INC., a Wisconsin corporation,

Plaintiff,

v. Civil Action No. 83-C-1764

CARROLL D. BESADNY, in his official capacity as Secretary of the Wisconsin Department of Natural Resources; the WISCONSIN DEPARTMENT —OF NATURAL RESOURCES, an Agency of the State of Wisconsin, and their officers, Agents, Servants, Employees, Attorneys, and all those persons in active participation with them,

Defendants.

STIPULATION

The plaintiff Waste Management of Wisconsin, Inc. by its attorneys Friebert, Finerty & St. John, and the defendants Carroll D. Besadny, in his capacity as Secretary of the Wisconsin Department of Natural Resources, and the Department of Natural Resources, by their attorneys Bronson C. LaFollette, Attorney General, and Carl A. Sinderbrand, Assistant Attorney General, hereby stipulate and agree to the following facts:

1. Waste Management of Wisconsin, Inc. is a Wisconsin corporation engaged in the business *inter alia* of owning and operating sanitary landfill sites, with its prin-

cipal place of business located at 3333 North Mayfair Road, Milwaukee, Wisconsin, 53222.

2. The defendant Carroll D. Besadny is the Secretary of the Wisconsin Department of Natural Resources ("the Department") who directly or indirectly is responsible for administering all of the powers and duties of the Wisconsin Department of Natural Resources and whose office is located at 101 South Webster Street, Madison, Wisconsin.

3. The defendant Wisconsin Department of Natural Resources is a state agency created pursuant to § 15.34, Wis. Stats., and is responsible for the licensing and regulation of sanitary landfill sites pursuant to Chapter 144, Wis. Stats.

4. The plaintiff is the lessor and operator for profit of a sanitary landfill site known as Muskego Sanitary Landfill, located in Waukesha County, Wisconsin. The landfill site is operated under licenses issued by the Wisconsin Department of Natural Resources, License Nos. 0141 and 2895, but that portion of the landfill subject to License No. 0141 has not actively accepted solid waste since 1981. Copies of the most recent licenses are attached hereto as Exhibits A and B, respectively.

5. Prior to issuance of License Nos. 0141 and 2895 (Exhibits A and B), other portions of the Muskego Sanitary Landfill were operated under License Nos. 0141 and 0936(a/k/a License Nos. 141 and 936). By an Order dated August 6, 1975, bearing No. 2A-75-1003, the Department ordered abandonment of those portions of the landfill. A copy of this Order is attached as Exhibit C. The time

deadlines set forth in Exhibit C were extended by the Department, and the ordered abandonment was completed according to the terms of the Order.

6. The landfill site is also operated under Plans of Operation, which were approved by the Department and whose terms are incorporated into the operating licenses.

SOUTHEAST AREA

7. On February 4, 1977 the Department approved the plaintiff's plan of operation for the construction and operation of the Southeast Area of the Muskego Sanitary Landfill pursuant to Chapter 144, Wis. Stats., (1975). A copy of that approved plan of operation and the Department's Division Report thereon are filed herewith as Exhibit D.

8. Filed herewith as Exhibit E is a copy of a February 11, 1977 letter from the Department to the plaintiff, with attachments, which authorizes disposal of waste in the southeast area.

9. Shortly thereafter, the plaintiff received from the Department an operating license regarding the Southeast Area pursuant to § 144.44(4)(b), Wis. Stats. (1975).

10. The plaintiff operated the Southeast Area of the Sanitary Landfill after receiving the approved plan of operation (Exhibit D) and License 0141 (Exhibit A). In 1981, the plaintiff stopped accepting solid waste in the Southeast Area, but is still bound to maintain that area according to the approved plan of operation.

EXPANSION AREA

11. On November 28, 1979, the Department of Natural Resources approved a second plan of operation for a

proposed landfill expansion submitted by the plaintiff for additional construction and continued operation of the Muskego Sanitary Landfill pursuant to § 144.44(3)(c), Wis. Stats. (1977). A copy of that approved plan of operation and the Department Report is filed herewith as Exhibit F.

12. Filed herewith as Exhibit G is a copy of a letter sent by the Department to the plaintiff dated July 3, 1980, which authorizes the plaintiff to begin site operations in the expansion area upon receipt of the operating license.

13. Shortly thereafter, the Department issued an operating license pursuant to § 144.44(4)(b), Wis. Stats. (1977) for the expansion area.

COMPLIANCE AND LICENSE RENEWALS

14. The plaintiff incurred substantial costs to construct its landfill site in accordance with the approved Plans of Operation. The plaintiff continuously incurs substantial costs to operate the facility in accordance with the approved Plans of Operation.

15. The plaintiff's licenses to operate the landfill site (southeast area and the expansion area) have been continuously renewed since the date of the initial licenses pursuant to § 144.44, Wis. Stats.

16. It is the Department's position that the Plaintiff has not substantially complied with its Plans of Operation and applicable administrative regulations. It is the Department's position that Waste Management has failed to consistently maintain leachate head levels in accordance

with the February 4, 1977 plan of operation, and that the landfill is operated in a manner which violates § NR 151.12(4)(b) Wis. Adm. Code (1977), and § NR 180.13 (10)(a)2. Wis. Adm. Code. The plaintiff denies each of these assertions. To date, no enforcement action has been initiated or administrative hearing held on these issues.

17. The plaintiff has never failed to pay the fees required by §§ 144.43 to 144.47, Wis. Stats.

18. The defendants have never denied, suspended or revoked the plaintiff's operating license for the Muskego Landfill Site, nor have the defendants brought an enforcement action against the plaintiff pursuant to § 144.47, Wis. Stats., with respect to the Muskego Landfill Site, although the Department considers the abandonment order referenced in paragraph 5 to be a type of enforcement action.

19. The expansion area of the Muskego Landfill Site covered by Exhibit B is subject to § 144.441, Wis. Stats. (1977), and the plaintiff is responsible under that section for the long term care of the site for thirty (30) years after the closing thereof.

DEPARTMENT MODIFICATIONS

20. On September 23, 1983, the Department sent the plaintiff a letter which the Department intended to be a modification of the plaintiff's existing approved Plans of Operation. A copy of the letter is filed herewith as Exhibit H. The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing.

21. The September 23, 1983 letter modified the Plans of Operation for both the Southeast and the expansion areas. Among other things, the letter requires the plaintiff to develop and submit a plan "for lowering leachate head levels in the Southeast Fill Area to a dry base level." The preparation of such a plan would require the expenditure of additional sums of money. The development of the plan, itself, would not change the day-to-day activities of the site. The implementation of such a plan, if ordered, would require the plaintiff's expenditure of unknown additional sums of money and further would result in a change of the day-to-day activities of the site.

22. Filed herewith as Exhibit I is a copy of the plaintiff's Request for Contested Case Hearing pursuant to § 227.064, Wis. Stats., filed by the plaintiff with the Department regarding the September 23, 1983 letter.

23. Filed herewith as Exhibit J is a copy of the Department's response denying the plaintiff's request for a contested case hearing on the modifications set forth in the September 23, 1983 letter.

24. On June 6, 1984, the Department sent the plaintiff another letter which the Department intended to be a modification of the plaintiff's existing approved Plans of Operation. A copy of the letter is filed herewith as Exhibit K. The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing.

25. The June 6, 1984 letter contains the Department's review of whether the plaintiff had complied with the September 23, 1983 letter. However, it also contains

additional modifications to the approved Plans of Operation. The modification letter requires that Waste Management take certain actions including the following, each of which involves the expenditure of additional sums of money:

a. Submit to the Department a proposed scope of work containing what the Department believes to be "an adequate number of [leachate] extraction points and a commitment by WMWI to remove and treat all leachate possible . . ."

b. Gather the data for and submit to the Department abandoned documentation for certain abandoned areas of the site.

c. Institute an expanded groundwater monitoring program.

d. Prepare and submit a report and provide an assessment regarding gas production and migration.

e. Prepare and submit a compilation of all leachate head level measurements and submit a "complete record of all leachate recirculated, hauled to MMSD for treatment, or otherwise disposed of."

f. Submit a report correcting certain leachate elevations, including a discussion of all "implications of this error and their significance."

g. Gather the information for, prepare and submit a report regarding the past and present operation of a sand and gravel pit adjacent to the old fill area which is neither owned nor operated by Waste Management. This report is to include "[a]n assessment of the potential for pumping from this operation to induce groundwater flow from the landfill area."

26. It is the Department's position as stated in the June 6, 1984 letter, that Waste Management is in violation

of the September 23, 1983 modification letter and both the September 23, 1983 and June 6, 1984 modification letters are agency action enforceable under sections 144.47, 144.98 and 144.99, Wis. Stats.

27. Attached hereto as Exhibit L is a copy of the Plaintiff's Request for a Contested Case Hearing pursuant to § 227.064, Wis. Stats., filed by the plaintiff with the Department regarding the June 6, 1984 letter.

28. Attached hereto as Exhibit M is a copy of the Department's response denying the plaintiff's Request for a Contested Case Hearing on the June 6, 1984 letter.

29. The process utilized by the Department in issuing and denying a hearing on the Septmber 23, 1983 and the June 6, 1984 modifications is consistent with prior and subsequent Department practice, which practice the Department intends to continue.

30. Prior to issuing Exhibit H and K the Department did not determine that an emergency situation existed, nor that the existence or operation of the Muskego Landfill Site posed an imminent hazard to the public health or welfare. No such determinations have been made to date by the Department.

31. The Muskego Landfill Site was constructed in accordance with the Plans of Operation, as originally approved by the Department.

32. Attached hereto as Exhibit N is a Memorandum Decision and Order of the Wisconsin Circuit Court in Case Nos. 553-751, 553-752, and 610-729 by the Honorable Michael D. Goulee. Attached as Exhibit O is a Memorandum Decision and Order of the Wisconsin Circuit Court

in Case No. 533-816 by the Honorable John E. McCormick. Attached as Exhibit P is a Decision and Order of the Circuit Court for Milwaukee County in Case No. 534-956 by the Honorable Thomas P. Doherty. Appeals regarding Exhibits N, O and P are pending in the Wisconsin Court of Appeals. None of these cases involve the Muskego Landfill Site.

33. The parties reserve the right to object to the relevancy or materiality of any of the above-stipulated facts.

34. The parties agree that this stipulation and the answers to the plaintiff's interrogatories (and the supplemental answers thereto) contain the only factual matters which the parties will submit for the summary judgment resolution of this matter and neither party will submit affidavits in connection with the summary judgment motion.

Dated at Milwaukee, Wisconsin, this 30th day of November, 1984.

FRIEBERT, FINERTY & ST. JOHN

By: /s/ Robert H. Friebert
Attorneys for Plaintiff

Dated at Milwaukee, Wisconsin, this 30th day of ber, 1984.

BRONSON C. LA FOLLETTE
Attorney General

By /s/ Carl A. Sinderbrand
Assistant Attorney General

Attorneys for Defendants

63/5417

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U. S. Const. amend XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wis. Stat. § 144.44(3)(c) (1985-86):

> *Approval; disapproval.* The department may not approve or disapprove a plan of operation until a favorable determination of feasibility has been issued for the facility. Upon the submission of a complete plan of operation, the department shall either approve or disapprove the plan in writing within 90 days or within 60 days after a favorable determination of feasibility is issued for the facility, whichever is later. The determination of the department shall be based upon compliance with the standards established under s. 144.435 or, in the case of hazardous waste facilities, with the rules and standards established under s. 144.62. An approval may be conditioned upon any requirements necessary to comply with the standards. Any approval may be modified by the department upon application of the licensee if newly discovered information indicates that the modification would not inhibit compliance with the standards adopted under s. 144.435 or, if applicable, s. 144.62. No plan of operation for a solid or hazardous waste facility may be approved unless the applicant submits technical and financial information required under ss. 144.441 and 144.443.

Wis. Stat. § 144.44(3)(d) (1985-86):

Approval. Approval under par. (c) entitles the applicant to construct the facility in accordance with the approved plan for not less than the design capacity specified in the determination of feasibility, unless the department establishes by a clear preponderance of the credible evidence that:

1. The facility is not constructed in accordance with the approved plan;

2. The facility poses a substantial hazard to public health or welfare; or

3. In-field conditions, not disclosed in the feasibility report or plan of operation, necessitate modifications of the plan to comply with standards in effect at the time of plan approval under s. 144.435 or, if applicable, s. 144.62.

Wis. Stat. § 144.44(3)(e) (1985-86):

Failure to comply with plan of operation. Failure to operate in accordance with the approved plan subjects the operator to enforcement under s. 144.47 or 144.73. If the department establishes that any failure to operate in accordance with the approved plan for a solid waste disposal facility is grievous and continuous, the operator is subject to suspension, revocation or denial of the operating license under sub. (4). If the operator fails to operate a hazardous waste facility in accordance with the approved plan, the department may suspend, revoke or deny the operating license under sub. (4).

Wis. Stat. § 144.44(4) (1985-86):

OPERATING LICENSE. (a) *License requirement.* No person may operate a solid waste facility or hazardous waste facility unless the person obtains an operating license from the department. The department shall issue an operating license with a duration of one year or more except that the department may

issue an initial license with a duration of less than one year. The department may deny, suspend or revoke the operating license of a solid waste disposal facility for failure to pay fees required under ss. 144.43 to 144.47 or for grievous and continuous failure to comply with the approved plan of operation under sub. (3) or, if no plan of operation exists with regard to the facility, for grievous and continuous failure to comply with the standards adopted under s. 144.435. The department may deny, suspend or revoke the operating license of a hazardous waste facility for failure to pay the fees required under ss. 144.43 to 144.47 or for failure to comply with the approved plan of operation under sub. (3). If the license application is for a solid waste disposal facility for solid waste resulting from mining operations in existence on May 21, 1978, the department shall make any determination with respect to whether disposal is being undertaken in an environmentally sound manner and shall administer compliance with the licensing requirement of this subsection in a manner which, with respect to nonhazardous solid waste, does not require substantial structural modification of the existing facility, expenditure which is not appropriate for the nonhazardous nature of the waste or interruption of the mining operation.

. . . .

(b) *Issuance of initial license.* The initial operating license for a solid waste disposal facility or a hazardous waste facility shall not be issued unless the facility has been constructed in substantial compliance with the operating plan approved under sub. (3). The department may require that compliance be certified in writing by a registered professional engineer. The department may by rule require, as a condition precedent to the issuance of the operating license for a solid waste disposal facility, that the applicant submit evidence that a notation of the exist-

ence of the facility has been recorded in the office of the register of deeds in each county in which a portion of the facility is located.

Wis. Stat. § 144.47 (1985-86):

Violations: enforcement. (1)(a) If the department has reason to believe that a violation of ss. 144.43 to 144.47 or any rule promulgated or special order, plan approval, or any term or condition of a license issued under those sections occurred, it may:

1. Cause written notice to be served upon the alleged violator. The notice shall specify the law or rule alleged to be violated, and contain the findings of fact on which the charge of violation is based, and, except as provided in s. 144.44(8), may include an order that necessary corrective action be taken within a reasonable time. This order shall become effective unless, no later than 30 days after the date the notice and order are served, the person named in the notice and order requests in writing a hearing before the department. Upon such request, the department shall after due notice hold a hearing. Instead of an order, and except as provided in s. 144.44(8), the department may require that the alleged violator appear before the department for a hearing at a time and place specified in the notice and answer the charges complained of; or

2. Initiate action under s. 144.98.

(b) If after such hearing the department finds that a violation has occurred, it shall affirm or modify its order previously issued, or issue an appropriate order for the prevention, abatement or control of the problems involved or for the taking of other corrective action as may be appropriate. If the department finds that no violation has occurred, it shall rescind its order. Any order issued as part of a notice or after hearing may prescribe one or more dates by which necessary action shall be taken in preventing, abating or controlling the violation.

Wis. Stat. § 144.99 (1985-86):

> *Penalties.* Any person who violates this chapter, except ss. 144.30 to 144.426 and 144.96(1), or any rule promulgated or any plan approval, license or special order issued under this chapter, except under those sections, shall forfeit not less than $10 nor more than $5,000, for each violation. Each day of continued violation is a separate offense. While the order is suspended, stayed or enjoined, this penalty shall not accrue.

Wis. Stat. § 227.47 (1985-86):

> *Decisions.* Every proposed or final decision of an agency or hearing examiner following a hearing and every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence. Every proposed or final decision shall include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53. The agency shall by rule establish a procedure for determination of parties.

0627G

Supreme Court, U.S.
FILED
JUN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1825

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v.

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 1988

QUESTIONS PRESENTED

1. Does the challenged modification to petitioner's approved plan of operation impair its property interests in its license, such that petitioner was entitled to due process under the Fourteenth Amendment?

2. Is the petitioner's challenge to the modification to its approved plan of operation moot?

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No. 87-1825

IN THE

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October Term, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v.

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent State of Wisconsin Department of Natural Resources (Department) respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Wisconsin Court of Appeals' decision in this case. That decision, which is

unreported, is reprinted in Petitioner's Appendix at App. 1-5.[1]

STATEMENT OF THE CASE

This case was initiated as an action seeking judicial review of a decision of the respondent under the Wisconsin Administrative Procedure Act, ch. 227, Wis. Stats. That decision, dated June 6, 1984, is a modification to the approved plan of operation for petitioner's "Muskego" landfill.

The plan modification in this case, issued pursuant to sec. 144.44(3)(d), Wis. Stats., is a review of ten reports submitted by Waste Management evaluating site performance and environmental conditions in the vicinity of the

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[1]Except as otherwise noted, all references to the appendix herein are to Petitioner's Appendix in the Petition for Writ of Certiorari.

landfill. App. 14-32. As a result of its review of these technical reports and its assessment of compliance with the existing plan of operation, the Department included five conditions and recommendations. App. 29-31. These conditions required: 1) submittal of the results of previously performed gas monitoring; 2) submittal of existing leachate head level[2] data; 3) correction of erroneous leachate elevation measurements; and 4) submittal of a report assessing groundwater flow patterns along the western perimeter of the site. A fifth provision recommends

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[2]"Leachate head level" is the elevation of leachate, toxic liquids that build up in the base of the landfill. Under the Muskego landfill's design, leachate must be collected and Waste Management must maintain specified leachate head levels to ensure that it does not leak out of the site and contaminate groundwater.

that Waste Management use analytical procedures with lower detection limits for certain contaminants.[3]

Prior to issuance of a decision in this case in either the trial court or court of appeals, the Wisconsin Supreme Court issued its decision in Waste Management of Wisconsin v. DNR, 128 Wis. 2d 59, 381 N.W.2d 318 (1986). In that case, the court specifically addressed the issues of: 1) what property interests in a plan of operation and license are created under secs. 144.44(3) and (4),

---

[3]In its arguments before the Wisconsin courts, petitioner asserted that the plan modification also imposed other requirements. Its petition to this court contains a similar characterization. See Petition at 5 n.1. The factual characterization of the modification and its affect on the petitioner's license is pertinent to the determination of whether it impairs a property interest created under state law. The Wisconsin courts rejected petitioner's factual assertions.

Wis. Stats.; and 2) whether the procedures utilized by the Department satisfy due process requirements. The court specifically held that petitioner has no constitutionally protected interest in its plan approval, but that it does have a constitutionally protected property interest in its license to operate the facility. Thus, to the extent a plan approval modification affects an operator's interest in its license, due process protections are required. Id., 128 Wis. 2d at 65, 74-77, 381 N.W.2d at 321, 325-26. The court specifically stated, 128 Wis. 2d at 77, 381 N.W.2d at 326:

> [T]he license creates in Waste Management a legitimate claim of entitlement to operate the site free only from modification of the conditions regarding the construction of the site. We hold, therefore, that Waste Management's interest in its license to operate the Omega Hills site constitutes a

> property interest which merits due process protection to the extent that Waste Management is legitimately entitled to operate its Omega Hills site free from modification of the conditions of construction.

Having determined that due process protections attached to the specific plan modifications before the court in that case, the court further considered what process is due. The court balanced the competing interests of the parties and evaluated the procedures used by the Department, as reflected in the record. The court then concluded that the process employed by the Department met due process requirements. Id., 128 Wis. 2d at 65, 80, 381 N.W.2d at 321, 327-28.

The petitioner did not seek further review of the decision of the Wisconsin Supreme Court. That court's determination of what agency approval constitutes

a protected property interest under Wisconsin law is not before this court.

In the case at bar, the court of appeals applied the analysis mandated in Waste Management of Wisconsin v. DNR. The court examined the challenged plan modification to determine whether any of those requirements related to construction requirements which might affect petitioner's property interest in its license. The court concluded, notwithstanding petitioner's assertions to the contrary, "that the modifications made by the DNR did not relate to the conditions of construction." App. 4.

The court did not hold, as asserted in the Petition for Writ of Certiorari, that petitioner is not entitled to due process if its license is affected. Rather, it held that no property interest was affected in this case.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER HAS NOT ESTABLISHED JUSTIFICATION FOR GRANTING A WRIT OF CERTIORARI UNDER RULE 17, RULES OF THE SUPREME COURT.

Rule 17.1, Rules of the Supreme Court, sets forth the reasons for which this Court will consider granting a writ of certiorari. While it is not a comprehensive list, it does include two criteria pertinent to review of a state court decision: 1) when the state court has decided a federal question in a way which conflicts with federal court decisions; and 2) when the state court has decided an important issue of federal law which has not been but should be resolved by this Court. Neither circumstance is presented here.

A. Petitioner has not raised an important issue of federal law which requires consideration or resolution by this Court.

Petitioner characterizes the fundamental issue as whether a licensed business is entitled to procedural due process before its interest in its license is impaired by state action. That is not an issue which flows from the state court decision sought to be reviewed and is not before this Court. Indeed, that issue was conclusively resolved in Waste Management of Wisconsin v. DNR, wherein the Wisconsin Supreme Court held that a state solid waste facility license creates a property interest which is protected by the procedural safeguards of the Fourteenth Amendment.

Nor does this case raise the issue of whether petitioner has a protected

property interest in its approved plan of operation. In Waste Management of Wisconsin v. DNR, the state supreme court unequivocally held that a plan approval does not create a property interest, and that petitioner is entitled to due process only if a modification thereto affects its interest in its license. Waste Management did not seek review of that decision and may not collaterally attack it in this action. Montana v. United States, 440 U.S. 147, 155 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). Moreover, this court has long recognized that for state-created property interests, "their dimensions are defined" under state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The fundamental issue raised by this action is a factual issue, whether the

specific challenged plan modification in this case affects petitioner's interest in its license.[4] This Court has expressed its reluctance to be a "court for corrections of errors in fact finding." Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949); Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2623 (1987). Accordingly, there is no compelling reason to grant the requested writ to review this issue.

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[4]Petitioner asserts that it did not receive notice or an opportunity to be heard. Petition for Writ of Certiorari at 5. The decision sought to be reviewed herein never reached that issue, since it concluded that petitioner was not entitled to notice and hearing. In Waste Management of Wisconsin v. DNR, the state supreme court held that the procedures generally used by the respondent, coupled with subsequent judicial review, satisfied due process requirements.

B. This Court cannot take jurisdiction under 28 U.S.C. § 1257(3) to review the issue whether the requirement to expend money to conform with regulatory requirements constitutes a deprivation of protected property.

A secondary issue raised by petitioner is whether the requirement to expend money to comply with regulatory requirements constitutes a deprivation of property subject to Fourteenth Amendment protections. This Court does not have jurisdiction to resolve this issue, as it was not raised before the Wisconsin Court of Appeals.

The petitioner would invoke this Court's jurisdiction under the authority of 28 U.S.C. § 1257(3) (Petition at 2). Before this Court may assume jurisdiction over such a case, however, the record must indicate that the federal question

was raised in the court below and that the state court decided the federal claim. "If both of these do not appear on the record, the appellate jurisdiction fails." Crowell v. Randell, 10 Pet. 368, 392 (1836). See also City of Springfield, Mass. v. Kibbe, 107 S. Ct. 1114, 1115, reh. den., 107 S. Ct. 1966 (1987); Hill v. California, 401 U.S. 797, 805 (1971). Because the record shows that the petitioner did not raise this federal issue and it was not decided by the state court, the petition should be denied.

In its brief before the Wisconsin Court of Appeals, the petitioner described, as it was required to do by Rule 809.19(1)(b), Wis. Stats., both the issues and a table of contents of the arguments which it was presenting to that court for review. A verbatim listing of

the table of contents and eight issues identified by the petitioner is attached to this brief as Appendix 101. Nothing therein suggests that petitioner asserted an entitlement to due process based on the duty to expend money to meet regulatory requirements. Nor is that issue reflected in the decision of the court of appeals. On the contrary, the court of appeals understood the only constitutional issue to be whether the plan modification affected petitioner's interest in its license. App. 3-4.

Irrespective of the court's jurisdiction, resolution of this issue is not warranted. It is well established that alterations of regulatory requirements which impose additional costs and duties do not violate the due process clause. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 19-20

(1976). See also LeClair v. Swift, 76 F. Supp. 729, 733 (E.D. Wis. 1948); Chicago, Milwaukee, St. Paul & Pacific R. Co. v. Public Service Comm., 260 Wis. 212, 227, 50 N.W.2d 416 (1951); Olson v. State Conservation Comm., 235 Wis. 473, 484, 293 N.W. 262 (1940).

C. The decision sought to be reviewed is consistent with prior decisions of this Court.

Petitioner asserts that the decision of the Wisconsin Court of Appeals conflicts with this Court's decision in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). This asserted conflict is premised upon petitioner's pervasive mischaracterization of the appellate court's ruling in this case.

In Loudermill, this Court ruled that a property interest created by state law

is not defined by the procedures that attach to a deprivation thereof. Id., 470 U.S. at 541. However, that case did not revise the long-standing principle that the existence of the property right is dependent upon and defined by state law. Id., 470 U.S. at 538. Rather, it only held that the procedures applicable to the deprivation of a property interest must meet the minimum requirements of the Fourteenth Amendment.

The decision in the case at bar does not deviate from or conflict with Loudermill, for it does not address the issue of what procedures apply to deprivation of one's interest in a solid waste facility license. Rather, it held that no property interest has been impaired, relying upon the unchallenged,

substantive test in Waste Management of Wisconsin v. DNR.[5]

Petitioner also asserts that the decision of the court of appeals conflicts with Ex Parte Young, 209 U.S. 123 (1908). Specifically, petitioner argues that the plan modification violates the due process clause because it subjects petitioner to potential license revocation and penalties without an opportunity to challenge the merits of the modification.

Ex Parte Young has no application here. In that case, the court held that a state may not require that one risk the imposition of severe penalties as the only means of challenging the applicable

---

[5]The Wisconsin Supreme Court, in assessing the constitutionality of respondent's plan modification process, expressly relied upon Loudermill. Waste Management of Wisconsin v. DNR, 128 Wis. 2d at 80, 381 N.W.2d at 327.

law or agency action. This ruling was amplified shortly thereafter in Wadley Southern Ry. v. Georgia, 235 U.S. 651, 662 (1915), in which the court held that due process only requires an opportunity to test the validity of the state action before penalties are imposed. This Court has subsequently recognized that the opportunity for judicial review without risk of forfeitures precludes application of Ex Parte Young. See, e.g., Reisman v. Caplin, 375 U.S. 440, 446-47 (1964); St. Louis, I. Mt. & So. Ry. Co. v. Williams, 251 U.S. 63, 65 (1919). See also Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2nd Cir. 1975).

In the case at bar, petitioner is not subjected to prosecution for noncompliance as the sole means of challenging the plan modification. The

respondent's decision is immediately reviewable under the Wisconsin Administrative Procedure Act, ch. 227, Wis. Stats. Petitioner has a right to challenge any aspect of the plan modification, including its constitutionality. Sec. 227.57, Wis. Stats. In the event the petitioner fears enforcement by the agency during the pendency of the judicial review proceeding, it may seek a stay of enforcement. Sec. 227.54, Wis. Stats.

It is particularly ironic that petitioner asserts that it has had no opportunity to challenge the agency action prior to enforcement, as this action arose as an action for judicial review under ch. 227, Wis. Stats. Although petitioner chose to assert only procedural issues, it has had ample

opportunity to raise substantive challenges without risk of enforcement.

II. THIS ACTION IS MOOT.

This Court has consistently held that it will not consider a case which has become moot due to the passage of time, unless it is one which will necessarily evade review. Burke v. Barnes, 107 S. Ct. 734 (1987); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Securities & Exch. Com'n v. Medical Com. for Human Rights, 404 U.S. 403, 407 (1972).

The challenged plan modification in this case was issued nearly four years ago. The information which it solicited was required to be submitted within ninety days. There is nothing in the Petition for Writ of Certiorari or the record presented to this Court which

suggests that petitioner failed to comply or that the state sought to enforce the requirements contained therein.

The plan approval modification process employed by the respondent, although likely to recur, is not one which perpetually evades review. Many plan modifications impose conditions regulating long-term activities, which do not become moot over time. Indeed, the agency actions in Waste Management of Wisconsin v. DNR were live controversies not mooted over time. Accordingly, there is no justification to consider this moot case.

CONCLUSION

For the reasons stated herein, the respondent respectfully requests the Court to deny the writ of certiorari.

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Answered by the trial court: No.

Question No. 2: Does the administrative record demonstrate that the Department of Natural Resources provided notice of its contemplated action in a manner sufficient to meet the requirements of due process under the 14th Amendment to the United States Constitution?

Not answered by the trial court.

Question No. 3: Does the administrative record demonstrate that the Department of Natural Resources provided a hearing to Waste Management sufficient to meet the minimum requirements of due process under the 14th

Amendment to the United States Constitution?

Not answered by the trial court.

Question No. 4: Do the contested case requirements of §§ 227.01, 227.07 and 227.14, Wis. Stats., apply to the final decision issued by the Department of Natural Resources?

Answered by the trial court: No.

Question No. 5: Did the Department of Natural Resources comply with the notice requirement of § 227.07(2), Wis. Stats.?

Answered by the trial court: Not applicable.

Question No. 6: Did the Department of Natural Resources comply with the hearing requirements of § 227.01 and § 227.07, Wis. Stats.?

Answered by the trial court: Not applicable.

Question No. 7: Was Waste Management entitled to a judgment in its favor setting aside and vacating or reversing and remand-

ing the modification based upon the Department of Natural Resources' violation of § 227.10, Wis. Stats.?

Answered by the trial court: No.

Question No. 8: As construed by the trial court, do the provisions of Chapter 144 and Chapter 227, Wis. Stats., deprive Waste Management of equal protection of the law?

Not answered by the trial court.

Supreme Court, U.S.
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No. 87-1825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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June, 1988

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OCTOBER TERM, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THE ISSUES PRESENTED BY WASTE MANAGEMENT ARE COMPELLING.

The Wisconsin Court of Appeals has held that there is no process due when the Wisconsin Department of Natural Resources ("WDNR"), after making statutorily required findings of fact, orders Waste Management of Wisconsin, Inc. ("Waste Management"), to change its business operation and compels Waste Management to expend funds to comply with the changes ordered by the WDNR. This holding directly conflicts with the Court's prior decisions in *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532 (1985) and *Ex parte Young*, 209 U.S. 123 (1908).

The Wisconsin Court of Appeals' decision in this case conflicts with *Cleveland Board of Education* v. *Loudermill*,

470 U.S. 532 (1985) because the Wisconsin Court of Appeals held that the WDNR may condition the granting of a license to Waste Management upon the WDNR's reserving the power to order Waste Management to expend funds and to change its licensed business operation without providing any notice or hearing; and (2) the Wisconsin Court of Appeals' decision in this case conflicts with *Ex parte Young*, 209 U.S. 123 (1908) because the WDNR has been granted the power to compel Waste Management either to comply with the Modification or risk substantial monetary penalties and possible license revocation without providing Waste Management with any opportunity to challenge the merits of the Modification in a fact finding proceeding.

The respondent's assertion at p. 18 of its brief that *Ex parte Young* does not apply because "petitioner is not subjected to prosecution for noncompliance as the sole means of challenging the plan modification" is constitutionally irrelevant. The Modification is a final, enforceable decision. Waste Management was not afforded an opportunity to challenge the Modification on the merits in a fact finding proceeding. Waste Management will not be allowed to challenge the Modification on the merits in any subsequent WDNR enforcement action, however denominated. This result is entirely contrary to *Ex parte Young*.

Contrary to respondent's assertion's at pp. 9-11 of its brief, the issue in this case was not resolved by the Wisconsin Supreme Court in *Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 128 Wis. 2d 59, 381 N.W.2d 318 (1986), nor is it fact-specific. The respondent misstates the Wisconsin Supreme Court's holding in the 1986 *Waste Management* case to be that "the procedures generally used by the respondent, coupled with subsequent judicial review, satisfied due process requirements." (Resp. Br., p. 11 n.4) Nowhere in that decision does the Wisconsin Supreme Court come close to such a holding. The court held that that Modification impaired Waste Management's property interests and that the type of

hearing provided in that case satisfied the requirements of due process, if supplemented by judicial review. *Id.* at 80. Here, the Wisconsin Court of Appeals held that the Modification did not impair any property interest and that Waste Management was not entitled to any notice or hearing.

II. THE ISSUES ARE PROPERLY BEFORE THE COURT AND ARE NOT DE MINIMIS.

The issues presented in Waste Management's petition were presented to the Milwaukee County Circuit Court in the petitioner's petition for judicial review, the Wisconsin Court of Appeals in the petitioner's appellant's brief, and the Wisconsin Supreme Court in the petitioner's petition for review. Before each court, Waste Management asserted that its property interest in its license was deprived by the Modification.

The Modification is reprinted in the appendix to Waste Management's petition. (App., 14-32) The Modification orders Waste Management to proceed with plans to construct a leachate collection system (App., 21), institute an expanded groundwater monitoring program (App., 25-27), collect data, and prepare and submit additional reports on the operation of the Muskego Site. (App., 29-31) The WDNR's attempt to characterize the requirements of the Modification as minimal and thus not a deprivation of Waste Management's property interest is contrary to the actual requirements contained therein. The Modification plainly requires Waste Management to change its business operation at the Muskego Site and it requires Waste Management to expend funds in order to comply with the terms of the Modification.

III. THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES REFUSES TO RECOGNIZE THE PROCESS DUE IN ADJUDICATORY PROCEEDINGS.

The WDNR attempts to obfuscate the issue in this case by ignoring the fundamental distinction that exists between administrative proceedings for the purpose of promulgating

rules and proceedings designed to adjudicate disputed facts in particular cases. In adjudicatory proceedings, due process requires notice and a hearing. *See, e.g., Morgan* v. *United States*, 304 U.S. 1, 14-15, *reh'g denied*, 304 U.S. 1 (1938). There can be no dispute that the action of the WDNR in issuing the Modification in this case is adjudicatory as the WDNR is required by statute to make specific factual determinations before issuing the Modification. *See id.* (*See also* Petition, pp. 10-13.) The Modification is directed to and only affects Waste Management. Due process requires notice and a hearing.

As support for its position that the WDNR may order Waste Management to expend funds and change its licensed business operation without providing any notice or a hearing, the WDNR cites cases which are simply inapplicable to this case. All of the cases relied upon by the respondent are either rule-making cases or adjudication cases where notice and a hearing were actually provided. (*See* Resp. Br., pp. 14-15.)

The respondent relies principally upon *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). (Resp. Br., p. 14.) That case does not authorize denial of notice and a hearing in administrative adjudicatory matters. The *Usery* case involved a challenge to the constitutionality of Title IV of the Federal Coal Mine Health & Safety Act of 1969, a Congressional enactment applicable to all. In the present case, the WDNR issued an adjudicatory order to one particular person.

The 1948 federal district court case and the Wisconsin cases cited by the respondent are also wholly inapposite and do not authorize the denial of notice and a hearing to Waste Management. *LeClair* v. *Swift*, 76 F. Supp. 729 (E.D. Wis. 1948), involved a conflict of law question between federal and Wisconsin statutes concerning fishing rights. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* v. *Public Service Commission*, 260 Wis. 212, 50 N.W.2d 416 (1951), involved a challenge to an adjudicatory order of the Public

Service Commission issued to the railroad *after* the railroad was afforded notice and a hearing on the matter. *Olson* v. *State Conservation Commission*, 235 Wis. 473, 293 N.W. 262 (1940), involved a challenge to a general administrative order, legislative in nature, which applied equally to all commercial fishermen. The WDNR has cited no cases which authorize a state agency, after making specific findings of fact without providing notice and a hearing, to order one particular licensed business to change its business operation and expend funds.

IV. THIS ACTION IS NOT MOOT

The WDNR's argument that the action is moot is without merit. Obviously, after the 90 day period expired within which Waste Management was ordered to comply with the terms of the Modification, Waste Management was (1) in total violation, (2) in partial violation, or (3) in compliance with the Modification. None of these circumstances renders the case moot. With respect to the first two possibilities, the WDNR's failure to date to enforce the Modification pending the resolution of this case does not render the action moot. *See Reeves, Inc.* v. *Stake*, 447 U.S. 429, 434 n.5 (1980) (enforcement of challenged state preferential policy discontinued but might recur so case not moot); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (temporary moratorium on use of challenged police practice did not moot case). Waste Management's compliance pending a resolution of this action does not moot the action. *See Allee* v. *Medrano*, 416 U.S. 802, 809-11 (1974). There is no indication that respondent concedes in urging mootness that the Modification was in error and can be disregarded by the petitioner. *Cf. Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 569 (1984). To the contrary, the respondent continues to defend the Modification and requires compliance. The respondent's mootness argument exacerbates the dilemma condemned in *Ex parte Young*. Waste Management cannot be placed in the untenable position of only being allowed to

test the constitutionality of a Modification in an enforcement action.*

In addition, even if Waste Management was not subjected to enforcement upon the expiration of the 90 days set forth in the Modification, the WDNR admits that continued regulation through the use of Modifications without providing notice and a hearing is likely to recur. (*See* Resp. Br., p. 21.) For this reason as well, this action is not moot. *See First National Bank* v. *Bellotti*, 435 U.S. 765, 774, *reh'g denied*, 438 U.S. 907 (1978) (case does not become moot when the challenged action is too short to be fully litigated prior to its cessation and there is a reasonable expectation that the complaining party will be subjected to the same action again).

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*It is curious that the WDNR's mootness argument arises for the first time in its brief in opposition to the petition for certiorari. Previously, the WDNR urged that total compliance with the Modification was required.

CONCLUSION

On the basis of the original petition and this reply, the petitioner respectfully requests that the Court grant its Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin, District I.

Respectfully submitted,

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No. .....

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In The
Supreme Court of the United States
October Term, 1987

—o—

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

vs.

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT I.

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QUESTIONS PRESENTED

The Court of Appeals of Wisconsin held that the state agency, after making adverse factual findings regarding the petitioner without providing any notice or hearing, may order the petitioner, which operates pursuant to a state license, to change its business operation and may compel the petitioner to expend funds to comply with the changes ordered by the agency. Any failure to comply with the agency's order exposes the petitioner to monetary penalties and license revocation. The questions presented are:

1. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require the state agency to provide notice and a hearing when it orders the petitioner to expend funds and to change its business operation?

2. Does it violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as interpreted by the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), for the state agency to grant a license to the petitioner and at the same time to condition the granting of the license by authorizing the agency to order the petitioner to expend funds and to change its business operation without the agency providing the petitioner any notice or opportunity to be heard?

3. Does it violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as interpreted by the Court in *Ex parte Young*, 209 U.S. 123 (1908), for the state agency, without providing any notice or opportunity to be heard, to compel the petitioner either to expend funds and change the manner in which it operates its business or risk substantial monetary penalties and license revocation?

RULE 28.1 LIST OF RELATED CORPORATIONS

Waste Management, Inc.
Chemical Waste Management, Inc.

The petitioner, Waste Management of Wisconsin, Inc., is a wholly owned subsidiary of Waste Management, Inc. All other related companies are wholly owned subsidiaries of Waste Management, Inc. or Chemical Waste Management, Inc.

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No. .....

In The

Supreme Court of the United States

October Term, 1987

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

vs.

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT I.

The petitioner, Waste Management of Wisconsin, Inc., respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of Wisconsin, District I, rendered on December 8, 1987 in this case. The Supreme Court of Wisconsin denied discretionary review of the decision in an order dated February 9, 1988.

OPINIONS BELOW

The order of the Supreme Court of Wisconsin denying discretionary review is unreported. It is reprinted in the appendix hereto. (App., 33)

The opinion of the Court of Appeals of Wisconsin, District I, has not been published. It is reprinted in the appendix hereto. (App., 1-5)

The order of the Circuit Court of Milwaukee County is unreported. It is reprinted in the appendix hereto. (App., 6-7)

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JURISDICTION

The petitioner seeks review of a decision of the Wisconsin Court of Appeals entered on December 8, 1987, affirming an order of the Circuit Court of Milwaukee County dated September 17, 1986. (App., 1-5) The petitioner's Petition for Review to the Supreme Court of Wisconsin, timely filed on January 7, 1988, was denied on February 9, 1988. (App., 33) By order dated February 10, 1988, the Wisconsin Court of Appeals formally affirmed the decision of the Circuit Court of Milwaukee County and remitted the record to the Circuit Court of Milwaukee County. (App., 34) The jurisdiction of the Supreme Court of the United States to review the decision of the Wisconsin Court of Appeals is invoked under 28 U.S.C. § 1257(3).

The Milwaukee County Circuit Court decided all of the issues adversely to the petitioner, remanded the matter to the Wisconsin Department of Natural Resources to

make findings of fact and conclusions of law in accordance with Wisconsin statutory law, and dismissed the petitioner's Petition for Judicial Review. (App., 6-13) In Wisconsin, an order of the circuit court remanding a case to the administrative agency is a final decision and appealable as of right. *Bearns v. Department of Industry, Labor & Human Relations*, 102 Wis. 2d 70, 76, 306 N.W.2d 22, 25 (1981).

The Wisconsin Court of Appeals decided all of the issues adversely to the petitioner and affirmed the decision of the Milwaukee County Circuit Court. (App., 1-5) The Wisconsin Court of Appeals' decision is final and reviewable because it is final and complete as to all of the parties, as to the whole subject-matter and as to all of the causes of action involved. *See Collins v. Miller*, 252 U.S. 364, 370 (1920). No further proceedings will be held and nothing remains to be done except the Wisconsin Department of Natural Resources' ministerial act of issuing findings of fact and conclusions of law in accordance with the Wisconsin statutes. *See Department of Banking v. Pink*, 317 U.S. 264, 267-68 (1942), *reh'g denied*, 318 U.S. 803 (1943). The issuance of findings of fact and conclusions of law will not affect the constitutional questions presented because they have been definitively resolved by the Wisconsin Court of Appeals. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162 (1973).

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

CONSTITUTIONAL PROVISION

U. S. Const. amend. XIV, § 1

STATUTES

Wis. Stat. § 144.44(3)(c) (1985-86)

Wis. Stat. § 144.44(3)(d) (1985-86)

Wis. Stat. § 144.44(3)(e) (1985-86)

Wis. Stat. § 144.44(4)(1985-86)

Wis. Stat. § 144.47 (1985-86)

Wis. Stat. § 144.99 (1985-86)

Wis. Stat. § 227.47 (1985-86)

Constitutional provision and statutes are set forth verbatim in the appendix. (App., 77-81)

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STATEMENT OF THE CASE

Waste Management of Wisconsin, Inc. ("Waste Management") operates the Muskego Sanitary Landfill Site ("the Muskego Site") in Waukesha, Wisconsin, pursuant to a license and an approved Plan of Operation issued by the Wisconsin Department of Natural Resources ("WDNR"). (App., 61 ¶4; App., 69 ¶4; App., 70 ¶6; R:9; R:3) The approved Plan of Operation contains the final design specifications and operation criteria for the landfill site, including closure and postclosure maintenance plans.

See Wis. Stat. § 144.44(3) (1985-86). The terms of the approved Plan of Operation are incorporated into Waste Management's license to operate this business. After Waste Management received its first license for the Muskego Site in 1977, the WDNR annually renewed Waste Management's operating license. (App., 71 ¶15; R:9)

On June 6, 1984, through a device entitled "Plan of Operation Modification" (hereinafter referred to as "the Modification"), the WDNR imposed new and additional requirements upon the manner in which Waste Management operates its business at its Muskego Site.[1] (App., 14-32; R:3) The Modification, directed specifically to Waste Management, also compelled Waste Management to expend funds. (App., 73-74 ¶25) Any failure to comply with the Modification exposes Waste Management to the potential of substantial fines and penalties as well as possible loss of its license. The Modification was effective immediately upon issuance.

The WDNR never provided Waste Management with any notice that the WDNR intended to compel these changes and expenditures, and the WDNR never provided Waste Management with any opportunity to be heard.[2]

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[1]The June 6, 1984 Modification ordered Waste Management to proceed with plans to construct a leachate collection system, monitor additional wells, and collect data, prepare and submit additional reports on the operation of the Muskego Site. (App., 14-32; R:3)

[2]In 1984, Waste Management filed an action in the United States District Court for the Eastern District of Wisconsin for declaratory and injunctive relief pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and 42 U.S.C. § 1983, alleging, *inter alia*, that the very same Modification at issue in this case deprived Waste

(Continued on following page)

Waste Management sought judicial review of the WDNR's decision in the Circuit Court for Milwaukee County. (App., 60-67; R:1) The Petition for Judicial Review alleged, *inter alia*, that the WDNR's failure to provide any notice or opportunity to be heard violated Waste Management's Fourteenth Amendment right to due process of law. (App., 64 ¶ 14; App., 66 ¶ 19; R:1) The circuit court dismissed Waste Management's Petition for Judicial Review on the merits, but remanded the Modification to the WDNR for findings of fact and conclusions of law in accordance with Wisconsin statutory law.[3] (App., 6-13; R:12; R:13)

Petitioner appealed to the Wisconsin Court of Appeals, District I, arguing, *inter alia*, that the WDNR violated Waste Management's Fourteenth Amendment right to due process of law by failing to provide any notice or

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(Continued from previous page)

Management of its property without due process of law. The WDNR stipulated in that action that it did not provide Waste Management with any notice or hearing prior to or subsequent to issuing the Modification. (App., 73 ¶ 24; R:9) The district court has made inquiries concerning the progress of the state litigation, and the application of the doctrines of abstention and collateral estoppel. The passage of time has resulted in an informal stay of that action, for all practical purposes. The pending district court action does not impair the Court's jurisdiction to review this case. *See* 12J. Moore, *Moore's Federal Practice*, ¶ 508.01[8] (2d ed. 1982).

[3]Every final agency decision must be "in writing accompanied by findings of fact and conclusions of law." Wis. Stat. § 227.47 (1985-86). (App., 81) A Modification issued without notice and without a hearing, but containing the statutorily required findings of fact and conclusions of law will only correct the form of the decision under Wisconsin law; it will not cure the WDNR's unconstitutional procedure. Thus, it does not "wipe the slate clean." *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Peralta v. Heights Medical Center, Inc.*, 485 U.S. —, 99 L.Ed.2d 75, 82 (1988).

hearing in connection with the Modification. (App., 45-59) The Wisconsin Court of Appeals held that the Modification did not deprive Waste Management of its property rights and that the WDNR may specifically order Waste Management to expend funds and change its business operation without providing Waste Management any notice or hearing. *Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources,* No. 86-1934, slip op. (Wis. Ct. App. Dec. 8, 1987). (App., 1-5)

In its decision, the Wisconsin Court of Appeals relied upon an earlier Wisconsin Supreme Court decision in *Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources,* 128 Wis. 2d 59, 381 N.W.2d 318 (1986). In that case, the Wisconsin Supreme Court reviewed modifications to a plan of operation issued by the WDNR to a different landfill site (Omega Hills). The Wisconsin Supreme Court held that Waste Management's interest in its license to operate a landfill site constitutes a property interest to the extent that Waste Management is entitled to operate the site free from modification of the conditions of construction of the site as distinguished from conditions of operation. *Id.* at 77, 381 N.W.2d at 326. The Wisconsin Supreme Court then held that Waste Management was entitled to notice and an opportunity to be heard prior to the issuance of that Modification. *Id.* at 78-80, 381 N.W.2d at 326-28. The Wisconsin Court of Appeals relied exclusively upon the Wisconsin Supreme Court's discussion regarding differences between con-

struction and operation of a landfill site in concluding that the Modification did not deprive Waste Management of its property rights.

> Waste Management's interest in its license to operate the Muskego Site is a property interest which merits due process protection to the extent that Waste Management is entitled to operate the site free from modification of the conditions of construction. [*Waste Management,* 128 Wis. 2d at 76-77, 381 N.W.2d at 326.] However, upon our review of the record, we conclude that the modifications made by the DNR did not relate to the conditions of construction. They concerned an ongoing groundwater investigation and related only to opeartion.

Waste Management, No. 86-1934, slip op. at 4-5. (App., 4)

Petitioner timely filed a Petition for Review of the Wisconsin Court of Appeals' decision in the Wisconsin Supreme Court seeking review of all of the issues raised in the Wisconsin Court of Appeals. (App., 35-44) The Wisconsin Supreme Court denied discretionary review in an order dated February 9, 1988. (App., 33)

REASONS FOR GRANTING THE WRIT

I. THE ACTION OF THE WISCONSIN DEPARTMENT OF NATURAL RESOURCES DEPRIVES WASTE MANAGEMENT OF DUE PROCESS OF LAW.

A. Introduction

The Wisconsin Court of Appeals held that the WDNR may order Waste Management, a company licensed to en-

gage in a regulated industry, to expend funds and change its business operation without providing any notice or opportunity to be heard. Before entering its order, the WDNR is required by statute to find one of three facts, "by a clear preponderance of the credible evidence." *See* Wis. Stat. § 144.44(3)(d) (1985-86). (App., 78) Any failure to comply with the order exposes Waste Management to the possibility of substantial fines and penalties as well as possible loss of its license. No other company in the industry is subject to or affected by the Modification.

B. Waste Management Has A Property Interest In Its Funds, Its Business And Its License For the Muskego Site.

Chapter 144, Wis. Stat. (1985-86), confers on Waste Management a property right in its license to engage in the business of operating a solid waste facility in accordance with the terms and conditions as set forth in the approved Plan of Operation. The Modification issued by the WDNR deprives Waste Management of its property interests in its license and its business because it orders Waste Management to change its licensed business operation. Further, the Modification deprives Waste Management of its property interest because it requires Waste Management to expend funds. Any failure to comply with the Modification exposes Waste Management to the possibility of substantial monetary penalties and license revocation.

In *Board of Regents v. Roth,* 408 U.S. 564 (1972), the Court discussed the origin of property interests protected by procedural due process.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their di-

> mensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. Waste Management has been granted a license and is operating the Muskego Site pursuant to its license. Waste Management has the right to continue to operate pursuant to its license as long as there is no "grievous and continuous failure to comply with the approved plan of operation . . . ." Wis. Stat. § 144.44(4)(a) (1985-86). (App., 78-79) Clearly, Waste Management has a property interest in the license and in its business. *See Truax v. Corrigan*, 257 U.S. 312, 327 (1921).

C. The Action Of The Wisconsin Department Of Natural Resources Is Adjudicatory Requiring Notice And A Hearing.

The WDNR's power to modify any aspect of an approved Plan of Operation is severely limited by statute. The WDNR must first establish "by a clear preponderance of the credible evidence" that one of three specific facts exists.

> Approval [of a plan of operation] entitles the applicant to construct the facility in accordance with the approved plan for not less than the design capacity specified in the determination of feasibility, unless the department establishes by a clear preponderance of the credible evidence that:
>
> 1. The facility is not constructed in accordance with the approved plan;
>
> 2. The facility poses a substantial hazard to public health or welfare; or

> 3. In-field conditions, not disclosed in the feasibility report or plan of operation, necessitate modifications of the plan to comply with standards in effect at the time of plan approval under s. 144.435 or, if applicable, s. 144.62.

Wis. Stat. § 144.44(3)(d) (1985-86). (App., 78) *See also Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources,* 128 Wis. 2d 59, 83-84, 91, 381 N.W.2d 318, 329, 332 (1986).

The Court has often recognized the fundamental due process distinction between administrative proceedings for the purpose of promulgating policy or legislative type rules and proceedings designed to adjudicate disputed facts in particular cases. *See, e.g., United States v. Florida East Coast Railway Co.,* 410 U.S. 224, 239, 242, 245 (1973). In proceedings for the purpose of promulgating policy or legislative type rules, the agency exercises a legislative function and due process does not require notice or a hearing. *See Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441, 445 (1915). *See also Atkins v. Parker,* 472 U.S. 115, 129 (1985) ("[t]he procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.'" [Citation omitted.]); *Minnesota State Board for Community Colleges v. Knight,* 465 U.S. 271, 284 (1984).

However, when an agency engages in an adjudicatory function, including the taking and weighing of evidence, the making of factual determinations based upon the evidence, and the making of a specific order supported by

such findings, the liberty and property of the targeted person must be protected by the fundamental requirements of due process. *Morgan v. United States*, 304 U.S. 1, 14-15, *reh'g denied*, 304 U.S. 1 (1938). *See also Atkins v. Parker*, 472 U.S. at 128-29. In administrative proceedings of an adjudicatory character, notice and a hearing are required to afford the targeted person an opportunity to challenge the government's contentions.

> Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues a final command.

Morgan, 304 U.S. at 18-19.

In this case, the Wisconsin Court of Appeals held that there is no process due when a state agency makes specific factual findings regarding one particular licensed and operating company and as a result of those findings orders the company to expend funds and to change the manner in which the company operates. Here, the agency order was accomplished by means of a device called a Modification. If allowed to stand, this method of regulation confers on a state agency virtually unlimited and revolutionary power to order a single regulated company to expend unlimited sums of money and to change the manner in which it operates its business. Such unchecked governmental power is contrary to the U.S. Const. amend. XIV, § 1 (App., 77) and to the Court's prior decisions.

Waste Management does not contend that the WDNR has no authority to regulate, in an adjudicatory manner, its business activities. All regulated businesses are subject

to changes imposed by the regulatory agency. The ordering of a Modification, however, is an adjudicatory action of the WDNR compelling notice and a hearing. Waste Management is thus entitled to notice and a hearing before the site specific (adjudicatory) findings are made and changes are ordered by the WDNR.

II. THE DECISION OF THE COURT OF APPEALS OF WISCONSIN SQUARELY CONFLICTS WITH CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532 (1985).

The Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985) held that once a property right is conferred by a state, that right cannot be revoked, amended or modified absent appropriate procedural safeguards as measured by federal constitutional standards. Specifically, the Court stated that " 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' " *Loudermill,* 470 U.S. at 541 (quoting *Vitek v. Jones,* 445 U.S. 480, 491 (1980)). *See also Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). The Court expressly rejected the argument that an employee's property right in continued employment was defined by and conditioned upon the state legislature's crafted procedures for its deprivation, holding:

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The

> point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." [Citations omitted.]

Loudermill, 470 U.S. at 541 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part)).

In this case, Waste Management has been granted a license entitling it to engage in the business of operating the Muskego Site pursuant to the terms contained in the approved Plan of Operation. *See* Wis. Stat. § 144.44(3)(d) (1985-86). (App., 78) Like the employee in *Loudermill* who had a property right in continued employment and who could be discharged only for cause in accordance with "appropriate procedural safeguards," Waste Management has a property interest in its license and business, which cannot be impaired absent "appropriate procedural safeguards."[4]

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[4]In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975), the Court stated that it is not inclined to distinguish among different kinds of property in applying the Due Process Clause.

The Wisconsin Court of Appeals in this case held that the WDNR may condition the granting of a license to Waste Management upon the WDNR's reserving the power to order Waste Management to expend funds and to change its business operation without providing any notice or hearing.

> In a letter dated February 4, 1977, the DNR approved Waste Management's proposed plan of operation. The approval was conditioned upon Waste Management's compliance with requirements set forth in an attached report and was subject to further modifications. Therefore, Waste Management's interest in its plan of operation is a "conditional" interest under the due process clause and does not merit due process protection. *See Waste Management of Wisconsin, Inc. v. Department of Natural Resources*, 128 Wis. 2d 59, 74-76, 381 N.W. 2d 318, 325-26 (1986).

Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources, No. 86-1934, slip op. at 4 (Wis. Ct. App. Dec. 8, 1987). (App., 3-4) This Wisconsin Court of Appeals' holding squarely conflicts with *Cleveland Board of Education v. Loudermill*.

III. THE DECISION OF THE COURT OF APPEALS OF WISCONSIN CONFLICTS WITH EX PARTE YOUNG, 209 U.S. 123 (1908).

The impact of the decision of the Wisconsin Court of Appeals coupled with Wisconsin enforcement statutes is that the WDNR has the power to compel Waste Management either to comply with the Modification or risk substantial monetary penalties and possible license revocation. This is an unprecedented exception to the prin-

ciple announced in *Ex parte Young*, 209 U.S. 123 (1908), that an agency action must be subject to a meaningful opportunity for challenge prior to enforcement or the accrual of penalties.

In *Ex parte Young*, the Court considered a state statute enabling an administrative agency to establish a schedule of railroad freight rates. The railroads were not provided any notice or opportunity to be heard before the rates became effective and enforceable by fines and penalties. If the railroads wished to assert that the rates deprived them of their property without just compensation, their only recourse was to suffer a criminal indictment and to contest the rates in the ensuing criminal prosecution.

The Court found the statutory framework to be a violation of the railroads' right to procedural due process.

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Ex parte Young, 209 U.S. at 147. The Court held that statutory provisions "imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates." *Id.* at 148. In *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 64-65 (1919), the Court reaffirmed the holding of *Ex parte Young*.

The Modification is a final, enforceable decision. Waste Management had no opportunity to challenge the Modification on the merits. Any failure to comply with the Modification exposes Waste Management to the risk of penalties up to $5,000.00 a day for each and every separate violation. Wis. Stat. § 144.99 (1985-86). (App., 81) In a forfeiture action, the issues are limited to (1) whether Waste Management has complied with the Modification; and, if not, (2) the appropriate penalty for noncompliance. According to the Wisconsin Court of Appeals, Waste Management has no right whatsoever to notice or a hearing; therefore, substantive challenges to the merits of the Modification in a fact finding proceeding are not allowed in Wisconsin.

In addition, if Waste Management fails to comply with the Modification, it is subject to enforcement under Wis. Stat. § 144.47 (1985-86), with the potential for suspension, denial or revocation of its operating license. *See* Wis. Stat. §§ 144.44(3)(e) and (4)(a) (1985-86). (App., 78-79) *See also Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources,* 128 Wis. 2d 59, 90, 381 N.W.2d 318, 332 (1986). Likewise, in an enforcement action, there is no opportunity to challenge the merits of the Modification in a fact finding proceeding.

In this case, Waste Management has suffered a deprivation of due process worse than the one recognized in *Ex parte Young.* In *Ex parte Young,* the railroads were permitted to challenge the merits of the rate schedule in the ensuing criminal prosecution which was a fact finding proceeding. Here, Waste Management has no opportunity, at any time, to challenge the merits of the Modification.

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CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision and opinion of the Court of Appeals of Wisconsin, District I.

Respectfully submitted,

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May, 1988

APPENDIX

No. 86-1934

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

WASTE MANAGEMENT OF WISCONSIN, INC.,
a domestic corporation,

Petitioner-Appellant,

v.

STATE OF WISCONSIN,
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

COURT OF APPEALS DECISION
DATED AND RELEASED

Dec. 08, 1987

A petition filed with the Supreme Court, a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

(Received December 8, 1987)

APPEAL from an order of the circuit court for Milwaukee county: JOSEPH P. CALLAN, Judge. *Affirmed.*

Before Moser, P.J., Sullivan and Brown, J.J.

SULLIVAN, J. Waste Management of Wisconsin, Inc. (Waste Management) appeals an order granting the

Department of Natural Resources' (DNR) motion to remand for findings of fact and conclusions of law and to dismiss Waste Management's petition for review. Three issues are raised on appeal: (1) whether the modification of the approved plan of operation for the Muskego site is a deprivation of Waste Management's interest in its license, (2) whether Waste Management is entitled to a contested case hearing under secs. 227.01, 227.44, and 227.51, Stats.,[1] and (3) whether Waste Management was deprived of equal protection of the law. We hold that the modification of the approved plan of operation is not a deprivation of Waste Management's interest in its license and that Waste Management is not entitled to a contested case hearing. We do not address the issue of equal protection as Waste Management raises it for the first time in this appeal. *Resseguie v. American Mut. Liab. Ins. Co.*, 51 Wis. 2d 92, 103, 186 N.W.2d 236, 242-43 (1971).

Waste Management operates the Muskego Sanitary Landfill pursuant to a license issued by the DNR. On June 6, 1984, the DNR sent a letter to Waste Management modifying the approved plan of operation for the Muskego Landfill. The following conditions and recommendations were made: (1) submittal of a report regarding gas production and migration, (2) submittal of a compilation of leachate head level measurements, (3) correction of leachate elevations, (4) submittal of a report assessing groundwater flow patterns along the western perimeter of

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[1] Chapter 227, Stats., was revised and renumbered by 1985 Wis. Act 182, effective April 22, 1986. All citations in this opinion are to the current version of the statutes.

the site, and (5) use of lower detection limits for certain contaminants (recommended).[2]

Waste Management filed a petition for judicial review, challenging the DNR's modification of the plan of operation. Waste Management then moved the court to enter judgment setting aside and vacating the decision of the DNR, or, in the alternative, to remand with directions that the DNR conduct a hearing according to the provisions of secs. 227.01, 227.44 and 227.51, Stats. The DNR moved the court to remand for findings of fact and conclusions of law and to dismiss Waste Management's petition for review. The trial court granted the DNR's motion remanding the matter to the agency for findings of fact and conclusions of law and dismissing Waste Management's petition for review.

MODIFICATION OF APPROVED PLAN OF OPERATION

Waste Management contends that the DNR's modification of the approved plan of operation is a deprivation of Waste Management's interest in its license and merits due process protection. We disagree.

In a letter dated February 4, 1977, the DNR approved Waste Management's proposed plan of operation. The approval was conditioned upon Waste Management's compliance with requirements set forth in an attached report and was subject to further modifications. Therefore, Waste Management's interest in its plan of operation is a "conditional" interest under the due process clause and

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[2] Other requirements set forth in the letter of June 6, 1984, were a reiteration and review of existing conditions.

does not merit due process protection. *See Waste Management of Wisconsin, Inc. v. Department of Natural Resources,* 128 Wis. 2d 59, 74-76, 381 N.W.2d 318, 325-26 (1986).

Waste Management argues that the modification alters the conditions of construction.[3] Waste Management's interest in its license to operate the Muskego site is a property interest which merits due process protection to the extent that Waste Management is entitled to operate the site free from modification of the conditions of construction. *Id.* at 76-77, 381 N.W.2d at 326. However, upon our review of the record, we conclude that the modifications made by the DNR did not relate to the conditions of construction. They concerned an ongoing groundwater contamination investigation and related only to operation.

CONTESTED CASE HEARING

Waste Management further contends that it was entitled to a contested case hearing pursuant to secs. 227.01, 227.44, and 227.51, Stats. We disagree.

Section 227.01(3), Stats., provides:

> "Contested case" means an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order.

---

[3] Some requirements in the approved plan of operation relate to construction, while others relate to operation or abandonment.

Waste Management has no due process or statutory right to a hearing before the DNR concerning the modification of the approved plan of operation for the Muskego site. This matter, therefore, does not meet the definitional requirements of a "contested case" and is not subject to the provisions of Chapter 227, Stats., concerning contested cases.

CONCLUSION

Waste Management is entitled to judicial review of the DNR's modification of the approved plan of operation under sec. 227.52, Stats. The DNR, however, failed to make findings of fact and conclusions of law as required by sec. 227.47, Stats. We therefore affirm the trial court's order remanding the matter to the DNR for findings of fact and conclusions of law and dismissing Waste Management's petition for review. *See id.* at 86-91, 381 N.W.2d at 330-32.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

WASTE MANAGEMENT
OF WISCONSIN, INC.,
a domestic corporation,

Petitioner,

v. Case No. 644-065

STATE OF WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES,

Respondent.

ORDER FOR DISMISSAL

WHEREAS, the petitioner has filed this action, pursuant to sec. 227.15, *et seq.*, Stats., challenging a plan approval modification issued by the respondent under sec. 144.44(3), Stats., on June 6, 1984;

WHEREAS, the Wisconsin Supreme Court issued a decision on February 11, 1986, in *Waste Management of Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 128 Wis. 2d 59, 381 N.W.2d 318 (1986), deciding *inter alia*, that plan approval modifications issued by the respondent under sec. 144.44(3), Stats., must conform to the form required by sec. 227.10, Stats. (1983);

WHEREAS, said decision of the Wisconsin Supreme Court requires that such plan approval modifications which do not conform to the form required by sec. 227.10, Stats., must be remanded to the agency; and

WHEREAS, the decision of the respondent being challenged in this case has not been issued in conformance with the form required by sec. 227.10, Stats.; and

WHEREAS, the respondent has moved the court for remand of the agency decision and dismissal of this action;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the plan approval modification under review herein is remanded to the agency for action consistent with the decision of the Wisconsin Supreme Court; and

2. That this action is dismissed with prejudice and without costs to either party.

Dated this 17th day of September, 1986.

BY THE COURT:

/s/ Joseph P. Callan
Circuit Judge

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

WASTE MANAGEMENT OF WISCONSIN, INC., a domestic corporation, Petitioner, vs. STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES, Respondent.	Case No. 644-065 DECISION ON MOTION FOR REMAND AND DISMISSAL AND MOTION TO ENTER JUDGMENT SETTING ASIDE AND VACATING THE DECISION OF THE DEPARTMENT OF NATURAL RESOURCES

(Received August 30, 1986)

This is an action for judicial review, brought pursuant to secs. 227.15 *et seq.*, Stats., which challenges the June 6, 1984 decision of the Wisconsin Department of Natural Resources (hereinafter "DNR") modifying certain conditions in the approved plan of operation for petitioner's Muskego Landfill. The petitioner is represented in this action by Friebert, Finerty & St. John, S.C., by Attorneys Robert H. Friebert and William S. Roush, Jr. The DNR is represented by Attorney General, Bronson C. La Follette and Assistant Attorney General, Carl A. Sinderbrand.

The DNR filed the instant Motion to Remand and Dismiss on April 18, 1986. A brief in support of that motion was filed May 5, 1986. The petitioner filed its Motion and Memorandum in support of its motion and in opposition to

the motion of the DNR on June 16, 1986. The petitioner has moved this Court for an order setting aside and vacating the June 6, 1984 decision of the DNR. In the alternative, the petitioner has moved for an order remanding this matter to the DNR for specific procedures in compliance with secs. 227.01, 227.07 and 227.14, Stats., and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The DNR replied to the petitioner's motion by letter brief filed on June 23, 1986. The motions were argued June 23, 1986. Attorneys Friebert and Roush appeared for the petitioner. Assistant Attorney General Sinderbrand appeared for the DNR.

This case is one of a number filed in state circuit court and federal court by the petitioner challenging the procedures utilized by the DNR in requiring modifications to the plan approvals for the petitioner's Milwaukee area landfills. Several of these cases, having been consolidated on appeal, were heard by the Wisconsin Supreme Court in *Waste Management of Wisconsin v. DNR,* 128 Wis. 2d 59; 381 N.W. 2d 318 (1986). The DNR argues that the holding in *Waste Management* requires remand of this matter to the agency for appropriate findings of fact and conclusions of law in accordance with sec. 227.10, Stats. The petitioner disputes this and contends that the decision in Waste Management did not fully address the petitioner's contention that a contested case hearing is required for modifications to plan approvals.

The DNR asserts that the *Waste Management* decision unequivocally rejected the claim of any statutory right to a hearing on a plan approval modification. The petitioner

cites secs. 227.01, 227.07 and 227.14, Stats., not found in the body of the opinion, in opposition to the DNR's contention.

Sec. 227.01(2), Stats., defines a contested case and sec. 227.07, Stats., delineates procedure in a contested case. On their face, these statutes do not create any right to a hearing before the DNR. The petitioner cites *Nick v. State Highway Comm.*, 21 Wis. 2d 489; 124 N.W. 2d 574 (1963) for the proposition that a hearing is required by these sections. The *Nick* decision held that the term "hearing required by law", present in sec. 227.01(2), Stats., presupposes a hearing provided by statute or administrative rule, or a hearing required by due process. In the instant case, due process would require a hearing under the petitioner's analysis.

The *Waste Management* decision clearly considered the circumstances which give rise to due process protections and what process was, therefore, due. The Supreme Court rejected the argument that Waste Management of Wisconsin's interest in the approved plan of operation merits due process protection. *Waste Management*, at p. 76. The Court did find that Waste Management of Wisconsin's interest in its license to operate the landfill site constitutes a property interest which merits due process protection to the extent it is legitimately entitled to operate the landfill free from modification of the conditions of construction. *Waste Management*, at p. 77. The Court went on to explain what would suffice as due process:

> Here, Waste Management engaged in correspondence with the DNR on several occasions detailing its reasons for believing that the DNR's requirements were

> unwarranted. In responding to Waste Management's concerns, the DNR offered reasons in support of its modifications. We conclude that this type of exchange, if supplemented by judicial review, sufficiently minimizes the risk of an erroneous deprivation of Waste Management's interest. Additional procedural safeguards, such as a full-fledged evidentiary hearing before the DNR, would impose a substantial additional fiscal and administrative burden upon the state without a corresponding decrease in the risk of an erroneous decision.

Waste Management, at p. 80. Due process need not require a contested case hearing before the DNR. The petitioner's reliance on sec. 227.01 and 227.07, Stats., to require such a hearing is misplaced.

The petitioner also advances sec. 227.14(1), Stats., as independent authority for a contested case hearing. That section provides:

> When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

This statute deals with the licensing process itself. If, in the context of a modification of a plan approval, an interest in a license is affected by a modification of the conditions of construction, the due process protections previously discussed apply. Sec. 227.14(1), Stats., does not apply to a modification of a plan approval.

The *Waste Management* decision emphasized that judicial review pursuant to sec. 227.15, Stats., is the cornerstone of due process protections in this kind of a case. As such, sec. 227.10, Stats., requiring that final decisions

of an agency be in writing accompanied by findings of fact and conclusions of law, must be complied with. It was not in this case. This is not merely a procedural technicality. The petitioner claims that a distinguishing feature of this case from those considered by the Supreme Court is the DNR's acknowledgment, in a stipulation filed in the United States District Court for the Eastern District of Wisconsin, that no notice of hearing whatsoever was provided to the petitioner in connection with the June 6, 1984 decision. The DNR counters that the same stipulation acknowledges that the plan modification at issue in this case required actions which would in no way affect the petitioner's interest in its license. These competing contentions illustrate what the Supreme Court observed in *Waste Management:*

> Had the DNR complied with sec. 227.10, Stats., in issuing its requirements to the plan of operation in these cases, we could now review the merits of the requirements. However, on this record we are unable to ascertain either the facts or the legal conclusions on which the DNR based its actions. *Id.*, at p. 91.

The DNR's Motion for Remand and Dismissal is appropriate and is granted. It follows that the petitioner's motion is denied. The DNR submitted a proposed order with its motion. Inasmuch as the *Waste Management* decision is now published in the Official Reports, the form of that proposed order is inappropriate. Counsel for the DNR is directed to prepare a revised order and submit it to the Court for signature.

Dated at Milwaukee, Wisconsin this 29th day of August, 1986.

BY THE COURT:

/s/ Joseph P. Callan
Circuit Judge, Br. 36

EXHIBIT A

State of Wisconsin

(SEAL)

June 6, 1984

RECEIVED ON 6/14/84 Carroll D. Besadny

BY [initials] Secretary

MASTER FILE *MUSKEGO* BOX 7921
MADISON, WISCONSIN 53707

cc Files(s) *Permit/License*

Groundwater

IN REPLY REFER TO: 4400

cc/info [initials]

Hal Cahill/ Dave Gryfin/ Mike Berg/ Bill Rousch

Mr. James E. O'Connor, District Manager
Waste Management of Wisconsin, Inc.
3333 N. Mayfair Road, Suite 306
Milwaukee, WI 53222

Mr. Carl Wauer, President
Muskego Rendering Company, Inc.

581 W21392 Wauer Lane
Muskego, WI 53150

Re: Muskego Sanitary Landfill, License Nos. 0141 and 2895

Muskego Rendering Company

Dear Messrs. O'Connor and Wauer:

The Bureau of Solid Waste Management has completed its review of several submittals regarding the ongoing groundwater contamination investigation in the Muskego Landfill/Rendering Plant area. These submittals, which

are listed below, were prepared in response to the requirements contained in the Department's September 23, 1983 review letter. Following each listing are explanatory comments regarding the submittal.

A. *Submittals*

1. A November 18, 1983 report prepared by Waste Management of Wisconsin, Inc. entitled "Response to Review—Phase II Groundwater Assessment—Muskego, Wisconsin" was received by the Department on November 23, 1983.

   The body of this report consisted of a three-page letter responding to the requirements contained in our September 23, 1983 letter. In our view, this letter contained two significant items:

   a. A statement by WMWI that it did not agree with our requirement to develop a "dry base" in the Southeast Area and therefore, did not intend to submit the required plan for lowering the leachate head levels as was required.

   b. A statement by WMWI that it believed the Department had acted inappropriately in assigning dual responsibilities (between its company and Muskego Rendering) for specific elements of further investigative work.

   Also included in the submittal as appendices were a separate report prepared by Warzyn Engineering, Inc. entitled "Supplemental Groundwater Investigation—Muskego Sanitary Landfill" and a topographic map prepared by Aero-Metric Engineering, Inc. showing site topography on November 27, 1982.

2. A December 30, 1983 report prepared by WMWI entitled "Closure Report—Southeast Fill Area and Reparative Fill #1—Muskego Sanitary

Landfill" was received by the Department on January 10, 1984.

This report did not include closure documentation for Reparative Fill # 2 or the portions of the Old Fill Area not encompassed by Reparative Fill # 1.

3. A January 24, 1984 letter from Mr. Wauer's consultant, Foth and Van Dyke and Associates, Inc. was received by the Department on January 25, 1983.

   This letter also requested separation of the respective responsibilities of WMWI and Muskego Rendering in regard to conditions 6, 7, and 8 of our September 23, 1983 letter.

4. A January 31, 1984 WMWI letter regarding leachate and private well monitoring was received by the Department on February 3, 1984. The purpose of this letter was to notify the Department that WMWI intended to comply with the additional groundwater and leachate monitoring specified in our September 23, 1983 letter. This entailed monitoring all private wells within the southern ½ of Section 18 west of and including the Berg home (located south of STH 24 approximately 620 feet, east of the intersection of STH 24 and Hillendale Drive) during the next two quarterly monitoring periods for certain indicator parameters as well as Primary and Secondary Drinking Water Standards. Also required was the monitoring of several leachate head wells in the Old Fill Area and Southeast Area within 60 days and annually thereafter for all 129 priority pollutants. WMWI's letter indicated that the results of both the private well and leachate monitoring would likely be available in early March 1984. As required by the Department's September 23, 1983 letter, the initial leachate and private well monitoring results were

due no later than November 23, 1983 and March 1, 1984 respectively.

5. A March 19, 1984 letter report prepared by WMWI in cooperation with Muskego Rendering was received by the Department on March 22, 1984.

   This report contained water quality results for the first of two rounds of additional private well monitoring required in condition 5 of our September 23, 1983 letter, along with well construction information from those residents able to provide it.

6. An April 10, 1984 WMWI submittal containing the organic priority pollutant sampling results for monitoring points TW-68 in the Old Fill Area and TW-77 and Riser 3 in the Southeast Area was received by the Department on April 20, 1984. The results of the metals fraction of the priority pollutants were said not to be available then and would be submitted at a later date.

7. An April 24, 1984 letter report prepared by WMWI in cooperation with Muskego Rendering. This report contained water quality results for the second of two rounds of additional private well monitoring required in condition 5 of our September 23, 1983 letter. The report was received by the Department on April 25, 1984.

8. A May 3, 1984 letter report prepared by WMWI was received by the Department on May 4, 1984. Two significant items were contained in this submittal:

   a. A proposed experimental program to evaluate the effectiveness of various leachate extraction systems in reducing leachate heads in landfills. The location of this experiment would be the Southeast Fill Area of the Muskego Landfill. Included in this proposal

was a statement by WMWI that they intend to increase short-term leachate extraction from the Southeast Area. However, no commitment was given regarding long-term increased leachate removal.

b. A proposal to expand the private well monitoring program specified in our September 23, 1983 letter. Although this proposal would have increased the number of private wells sampled, no monitoring for synthetic organic parameters was specified.

9. A May 9, 1984 letter report prepared by WMWI was received by the Department on May 10, 1984. This report included monitoring results for the parameter lead for the second-round private well sampling previously described in submittal number 7. Also included was an explanation of why lead was omitted in the first round of private well monitoring and a statement of WMWI's plan to compensate for this omission.

10. A May 16, 1984 letter report prepared by WMWI was received by the Department on May 18, 1984. This report contained three specific items:

a. The metals analyses on the three leachate samples described in submittal 6 above.

b. The water quality results of the second sampling of the Peters well.

c. The results of the second round lead analyses of the Ackman and Fischer wells.

B. *Previous Conditions*

The Department has reviewed these ten submittals to determine the degree to which they fulfill the requirements of our September 23, 1983 letter. Below is a listing of each requirement contained in the September 23, 1983 letter followed by a discussion. In sev-

eral instances, review of the submitted information has prompted the Department to modify certain requirements. Where possible, the Department has now separated the responsibilities of WMWI and Muskego Rendering. This has been done despite the fact that our original letter was structured as it was due to WMWI's original request that the Department not separate responsibilities, thereby allowing WMWI and Muskego Rendering to divide the required work as they saw fit. Conditions 1 through 4 were originally the responsibility of WMWI alone, and conditions 5 through 8 the joint responsibility of WMWI and Muskego Rendering.

1. "Develop and submit a plan, on or before January 1, 1984, for lowering leachate head levels in the Southeast Fill Area to a dry base level. This submittal shall include an estimate of the volume of leachate ponded within the site and the estimated time necessary to remove and treat this volume."

   In its November 18, 1983 report, WMWI contended that the Southeast Area was not having a significant effect on groundwater quality near private wells in the area and would not in the future. As a result, they indicated that lowering of the leachate head was unwarranted and that they did not intend to submit the required plan. Reasons given for this belief include the fact that the site is located in a natural clay deposit and that it was designed and constructed according to approved plans. In later correspondence dated May 3, 1984 WMWI restated its initial position regarding the need to establish dry base conditions in the Southeast Area. However, the submittal did propose the experimental program summarized in item A.7.a of this letter.

   The Department does not contest the fact that the site is constructed in a clay environment. How-

ever, we also recognize that the level of geological investigation, engineering design, and construction documentation that was thought appropriate several years ago does not compare with that of today. The Southeast Area, which was approved in early 1977, is no exception. Prior to its licensure, the only significant geological information available regarding the vertical extent of the clay deposit underlying this 20-acre site consisted of two 60-foot deep borings (#15 and #21).

In the last two years, several additional deep borings have been performed in the general vicinity of the Southeast Area. However, even with these newer borings, little remains known about the depth of the clay deposit throughout the entire area of the site or its degree of homogeneity.

In regard to its engineering design and construction documentation, the Southeast Area does not have a recompacted liner or sidewalls or a granular drainage blanket as would be required today for such a site, and documentation of the site's clay base consisted only of performing 5-foot deep backhoe pits on a 200-foot grid pattern. The site was also designed and approved with a leachate head maintenance level even though it appears that a significant portion of its base over which the deepest leachate ponding would occur is several feet above the water table. Furthermore, none of the four leachate risers originally installed remain functional. As a result, the only leachate extraction point now available is the caisson drilled near the original riser number 3. A separate concern is the fact that leachate recirculation was allowed in the Southeast Area as a means of keeping leachate levels below the leachate head maintenance level. Very little leachate has ever been removed from this site for treatment, while at the same time, the maintenance level has at least partially been met over the

years. Therefore, it is our opinion that substantial volumes of leachate have left the site. This is particularly evident in monitoring well E-21A (located east of the site just across Wauer Lane) which exhibits the poorest water quality of any monitoring well on the entire landfill/rendering plant complex.

For the above reasons, the Department disagrees with your contention that the Southeast Area is not having and will not have a significant impact on groundwater quality near private wells in its vicinity. With respect to the proposed experimental leachate extraction program, it is the Department's opinion that the information obtained from the study could be very useful. However, we believe that more than research is needed in the Southeast Area. Therefore, unless the proposed scope of work (scheduled for submittal in two to three months) contains what we believe to be an adequate number of extraction points and a commitment by WMWI to remove and treat all leachate possible, the Department will continue to consider WMWI to be in violation of this condition.

2. "Submit all as-built information on the past abandonment of the Southeast and Old Fill Areas as well as on the recent reparative fills, within 60 days of the date of this letter."

   The Department received abandonment documentation on January 10, 1984 for the Southeast Area and Reparative Fill #1 which indicates that these areas were properly abandoned. However, we have not received documentation for Reparative Fill #2 or the Old Fill Area. This information shall be submitted within 60 days of the date of this letter. Also, if any portions of the site are believed to have been properly abandoned but were not documented, a proposed documentation

program for these areas shall be included. Similarly, if any areas have not been properly abandoned, a proposed method, time schedule, and documentation program shall be included for doing so. The drainage swale running NW-SE along the western perimeter of the Southeast Area shall be specifically addressed in this submittal.

3. This condition specified the groundwater and leachate monitoring to be performed by WMWI. (For the sake of brevity, it will not be repeated here in its entirety.)

   Items a. through d. pertaining to quarterly sampling of on-site monitoring wells and specific private wells have been complied with and shall continue to be followed. Item e. required priority pollutant analyses of leachate samples within 60 days of the date of the letter and annually thereafter from three locations: TW-68 in the Old Fill Area and Risers 2 and 3 in the Southeast Area. Although several months late, the initial priority pollutant results for the leachate have been received. (With the Department's approval, leachate lead well TW-77 was substituted for risen number 2). Further discussion of this condition is included under condition 5.

4. "Develop a contour map of current topography on the land leased for the landfills."

   A contour map was included in the December 30, 1983 WMWI Report; therefore WMWI has complied with this condition.

5. This condition required that additional private wells be monitored during the next two quarterly monitoring periods for the parameters specified in 3.c. and d. This involved all private wells in the southern half of Section 18 west of and including the Berg well.

The first round of sampling results were received on March 22, 1984 and the second round on April 25, 1984. (Submittals 9 and 10 supplemented these initial reports.) After reviewing this information in conjunction with the leachate priority pollutant results, the Department has the following comments and concerns:

a. The well information obtained from homeowners during the monitoring done in the southern half of Section 18 indicated that a number of shallow wells exist in the area of the intersection of Hillendale Drive and STH 24. In addition two wells, Berg and Sackman, were found to be under artesian conditions.

b. Although none of the private well monitoring results exceeded Primary Drinking Water Standards (PDWS), elevated indicator parameters were observed in the Peters, Jovanovich and Krabbenhofts wells and to a lesser degree in the Sackman and Berg wells. Also, the first round of lead analyses performed showed a concentration equal to 40% of the PDWS in the Ackman well and a level at the PDWS in the Fisher well. However, subsequent testing of these two wells showed no detectable levels of lead using a detection limit equal to 20% of the PDWS.

c. The priority pollutant results for the leachate in the Old Fill Area and the Southeast Area detected no pesticides or PCBs. However, eleven different organic compounds were detected, some in significant concentrations. Because of the sample dilutions deemed necessary for the TW-77 sample due to fatty acid interferences (which result in higher detection limits), additional compounds may have been present in this leachate sample in normally detectable concentrations. Seven of

the eleven organic compounds detected were volatile organics, 2 were base/neutral extractables and 2 were acid extractables. Below is a listing of each organic compound detected, its maximum concentration, and where the sample was obtained from.

Volatile Organics

Benzene	0.018 mg/1	Riser 3 (SE Area)
Toluene	3.2 mg/1	TW-77 (SE Area)
Ethylbenzene	4.9 mg/1	TW-68 (Old Fill Area)
1, 1-Dichloroethane	1.9 mg/1	TW-77
Chloroethane	0.4 mg/1	TW-77
Methylene Chloride	2.6 mg/1	TW-77
1, 2-trans-Dichloroethylene	1.4 mg/1	TW-77

Base/Neutral Extractable Organics

Isophorone	0.015 mg/1	Riser 3
bis (2-Ethylhexyl) phthalate	0.032 mg/1	TW-68
Diethyl phthalate	0.12 mg/1	TW-77

Acid Extractable Organics

Pentachlorophenol	0.47 mg/1	TW-68
2, 4-Dimethylphenol	0.028 mg/1	TW-68

Results of the metals analyses for the three leachate samples appear to show a very pronounced anomaly. Riser number 3 in the Southeast Area and leachate head well TW-68 in the Old Fill Area show metals concentrations typical of "normal" leachate.

Riser number 3 is constructed of steel and TW-68 is constructed with PVC. However, head well TW-77, which has a galvanized metal well screen, showed metals concentrations far in excess of the other two locations. WMWI has expressed its belief that the Southeast Area leachate may be interacting with the galvanized well screen thereby causing the high metals results. Further metals analyses of additional leachate head wells will be necessary in order to confirm this contention.

d. Along Hillendale Drive, little information is available on private well construction and water quality north of the Klienmann home. Although not indicated as such in the work performed by Warzyn, it is possible that some of these wells may be downgradient of the wastewater lagoons.

As a result of the above considerations, the Department hereby modifies the approved monitoring program as follows:

1) Due to their location, depth of completion, or previous water quality results, the following private wells shall be added to the permanent quarterly monitoring program outlined in condition 3d. of our September 23, 1983 letter beginning with the second quarter, 1984 sampling:

WMWI's Responsibility		*Muskego Rendering's Responsibility*	
Dubiak	PW-10	Klienmann	PW-13
Kowal	PW-11	Seigmund	[NE]
State Sand & Gravel	PW-A	Aiuppa	[NE]
Frahmann	PW-C	Peters	[NE]
Berg	PW-D		
Krabbenhofts	PW-E		

Jovanovich	PW-F
Sackman	PW-G
Look (VFW)	PW-I
Eder	PW-J
Mageske	PW-M
Ficken	PW-N
Vitrano	[NE]*

*[NE] means not established yet.

2) In addition, the monitoring required in condition 5 shall be extended for at least four quarterly monitoring periods and the number of wells expanded to include those wells in the southern half of Section 18 west of the Berg home which are not included in condition 3d. as well as all private wells on both sides of Hillendale Drive that lie north of or even with the Klienmann residence and south of the northern most rendering plant lagoon. Monitoring of these wells along Hillendale Drive shall be the responsibility of Muskego Rendering and WMWI shall be responsible for monitoring those remaining wells in the southern half of Section 18. This additional monitoring shall also begin with the second quarter, 1984 sampling.

At the end of this year of monitoring, we will re-evaluate this requirement. This may result in the Department allowing some wells to be monitored less frequently and/or for a reduced list of parameters. It may also be possible that some wells will be allowed to be dropped from the monitoring program provided they show no apparent water quality degradation and that reliable information is obtained on the construction of the wells.

3) In order to determine the potential impact of of the galvanized well screens on leachate quality and to provide a more representative picture of organic chemicals in the sites' leachate, WMWI shall sample the following points for all Primary and Secondary Drinking Water Standard metals as well as the VOC fraction of the 129 priority pollutants:

TW-68	TW-79
TW-77	Riser 3
TW-78	Monitoring Well E-21A

The results of this sampling shall be submitted for Department review no later than August 1, 1984.

It is unlikely that this one-time sampling will completely resolve all questions regarding galvanized well screens. Therefore, after reviewing this initial data, it is likely that the Department will specify continued monitoring of some of the above points for at least these metals parameters.

4) Due to the detection of a number of organic compounds in the leachate monitoring results, the Department hereby requires WMWI to sample the following private wells a minimum of 2 times for:

All 129 Priority Pollutants		Only the Volatile Organic Fraction of the 129 Priority Pollutants	
Knutowski	PW-4	WMWI (Jacobi)	PW-1
WMWI (Kent)	PW-5	Zangerle	PW-9
WMWI (Johnson)	PW-6	Sawyer	PW-12
		Purdy	PW-22
		Peters	[NE]
		Berg	PW-D
		Krabbenhofts	PW-E
		Jovanovich	PW-F
		Sackman	PW-G

Sampling dates shall be staggered approximately 30 days. Complete results from the first sampling round shall be submitted to the Department no later than August 1, 1984 and no later than September 1, 1984 for the second round.

For the purpose of establishing background levels of these compounds, WMWI may wish to sample additional private wells in the area upgradient of the landfill and lagoons. Regardless of the results of these two sampling rounds, the Department will likely require some level of periodic organic monitoring for surrounding private wells. The extent of the parameters, the number of private wells and the sampling frequency will be determined after reviewing the monitoring required here.

6. "Define further the soil types and groundwater flow conditions and water quality near the postulated clay wedge and the wastewater lagoons."

   Discussion of this condition will follow number 7.

7. "Define further the soil conditions off-site to the southeast."

   Conditions 6 and 7 have been addressed to some degree by the November 17, 1983 Warzyn Report entitled "Supplemental Groundwater Investigation—Muskego Sanitary Landfill". The Department has decided to delay any further requirements regarding geologic investigation until further water quality evaluation occurs.

8. "Develop a water table contour map based on a current topographic map of the area shown by the aerial photo base map in the

Phase II report (see plan sheet C9784W-3). The scale shall be 1 inch = 200 feet or greater."

This condition has not been complied with.

C. *Additional Conditions and Recommendations*

As a result of our review of the ten submittals listed in Section A. of this letter, the Department has developed the following list of additional conditions and recommendations:

1. Within 90 days of the date of this letter, WMWI and Muskego Rendering shall submit a report regarding gas production and migration at the Muskego Landfill site including:

   a. A summary of the study previously performed by Muskego Rendering to investigate the possibility of energy recovery from the Southeast Area. Gas pressures within the refuse and their potential effect on leachate migration shall be specifically addressed.

   b. The results of all gas migration monitoring previously performed at the site as well as the location of any gas monitoring devices.

   c. An assessment, based on existing data, of the potential for gas migration away from the site in all directions and the possible threat to any surrounding structures. A discussion of the current status as well as the history behind the gas venting at the WMWI (Jacobi) home shall be specifically addressed.

2. Although quarterly measurements of leachate head levels in the Southeast Area were required in the Department's February 4, 1977 Plan of Operation Approval, our files contain the results for only a few quarters. Therefore, within 90 days of the date of this letter WMWI shall sub-

mit a compilation of all leachate head level measurements. Also, in order to aid in assessing the groundwater quality impacts of the Southeast Area, WMWI shall also submit a complete record of all leachate recirculated, hauled to the MMSD for treatment, or otherwise disposed of.

3. Recent discussions between WMWI and the Department have indicated that a significant error was made in the setting of a control monument located south of the rendering plant. This error was discovered during recent resurveying of the area. Therefore, all leachate elevations submitted as per condition 2 above shall be corrected to give true elevations. In addition, a discussion shall be included identifying all other implications of this error and their significance.

4. In the two groundwater assessment reports previously prepared, little or no mention has been made of the large sand and gravel pit located just west of the Old Fill Area and of the effect high-rate pumping from this facility may be having on groundwater flow patterns. Therefore, within 90 days of the date of this letter, WMWI shall submit a report including:

   a. A thorough discussion of the past and present operation of the pit including all available information on groundwater pumping rates and locations through time.

   b. An assessment of the potential for pumping from this operation to induce groundwater flow from the landfill area. Because of the limited number of monitoring wells located on the western perimeter of the landfill complex, this assessment may have to be largely qualitative. If it is believed that existing information is too sparse to reach a conclusion, additional monitoring wells should be pro-

posed along the landfills' western perimeters so that a determination can be made.

5. The Department has observed that in performing the analyses for the required private well monitoring, WMWI and Muskego Rendering have used detection limits equal to Primary Drinking Water Standards for several parameters. Because this practice would provide no advance warning of a potentially increasing water quality problem, the Department recommends that detection limits no greater than 1/10 the maximum contaminant level be used for these parameters. If WMWI and/or Muskego Rendering do not intend to comply with this recommendation, a letter shall be submitted to the Department within 60 days of the date of this letter fully explaining the reasons behind the refusal.

   The Department recommends that the individual reports required above be condensed into the fewest submittals possible.

   Upon completion of several rounds of the expanded private well monitoring specified within and submittal of the information necessary for compliance with the other requirements contained in this letter, the Department believes that enough information may be available to make a decision regarding the level of reparative work necessary in the Muskego Landfill/Rendering Plant area.

This letter constitutes a modification to the approved plans for the Waste Management of Wisconsin, Inc. Muskego Landfills #0141 and #2895. As such, this letter should be attached to the respective plan approvals and the changes made incorporated therein.

If you believe you have a right to challenge this decision, you should know that Wisconsin statutes and administrative codes establish time periods within which requests to review Department decisions must be filed. For judicial

review of a decision pursuant to ss. 227.15 and 227.16, Stats., you have 30 days after service of the decision to file your petition for review. The respondent in action for judicial review is the Department of Natural Resources. You may wish to seek legal counsel to determine your specific legal rights to challenge a decision. This notice is provided pursuant to s. 227.11(2), Stats.

Should you have any questions regarding the contents of this letter, please contact Vince Kalvin at (414) 562-9646, Dennis Mack at (608) 267-9386 or Stephen Scott (608) 267-9388.

Sincerely,

Bureau of Solid Waste Management

/s/ Richard G. Schuff,

Richard G. Schuff, P.E., Chief
Residuals Management and Land Disposal Section

DM:jmh/5032Y

cc: Honorable Wayne Salentine—Mayor of Muskego
Waukesha County Health Department

Doug Coenen—WMWI
Gerald Sevick—Foth and Van Dyke And Assoc., Inc.

Ted Bosch—SED
Skip Glor/Vince Kalvin—SED
SMS

Office of the Clerk

SUPREME COURT
STATE OF WISCONSIN

February 9, 1988

To Hon. Joseph P. Callan
Circuit Court for Milwaukee County
Safety Bldg., Rm. 336
821 W. State St.
Milwaukee, WI 53233

Robert H. Friebert
William S. Roush, Jr.
Caren B. Goldberg
Friebert, Finerty &
St. John, S.C.
Two Plaza East - Suite 1250
330 East Kilbourn Ave.
Milwaukee, WI 53202

Carl A. Sinderbrand
Asst. Attorney General
P. O. Box 7857
Madison, WI 53707-7857

The Court today announced an order in your case as follows:

No. 86-1934 *Waste Management of Wisconsin, Inc. v. State of Wisconsin DNR*

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of petitioner-appellant-petitioner, Waste Management of Wisconsin, Inc., and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

(Received Feb. 10, 1988)

MARILYN L. GRAVES
Clerk of Supreme Court.

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Waste Management of Wisconsin, Inc.,
a domestic corporation,

Petitioner-Appellant,

v.

State of Wisconsin,
Department of Natural Resources,

Respondent.

REMITTITUR
Appeal No. 86-1934
T.C. #644-065

This cause was an appeal to review the order of the Circuit Court of Milwaukee County. Upon consideration, it is ordered and adjudged by this Court in an opinion filed December 8, 1987, that the order of the Circuit Court of Milwaukee County, in this cause is affirmed. The appeal record is hereby returned to the clerk of the Circuit Court for Milwaukee County.

I certify that the above is a correct transcript of the original order and judgment of the court in the above-entitled cause. Dated this 10th day of February, 1988.

/s/ Marilyn L. Graves
Clerk, Court of Appeals

EXCERPTED PORTIONS OF PETITIONER'S PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, FILED IN THE STATE OF WISCONSIN SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

WASTE MANAGEMENT OF WISCONSIN, INC., a domestic corporation,

Petitioner-Appellant,

vs. Docket No. 86-1934

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, AND APPENDIX

FRIEBERT, FINERTY & ST. JOHN, S.C.

Robert H. Friebert
William S. Roush, Jr.
Caren B. Goldberg

Attorneys for Petitioner-Appellant

POST OFFICE ADDRESS:

Two Plaza East - Suite 1250
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
(414) 271-0130

ISSUES PRESENTED

1. Can the Department of Natural Resources, an agency of the State of Wisconsin, modify the terms and conditions under which a licensed bus-

iness operates, without prior notice and a meaningful opportunity to be heard as required by the due process clauses of U.S. Const. amend. XIV and Wis. Const. art. I, § 1, when the terms and conditions are established under a statute specifically limiting the Department's authority to require modification?

Answered by the court of appeals: Yes.

2. Can the Department of Natural Resources, an agency of the State of Wisconsin, condition the issuance of a license to a business upon the Department's right to modify the terms and conditions of the license without any prior notice or a hearing as required by the due process clauses of U.S. Const. amend. XIV and Wis. Const. art. I, § 1, in light of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)?

Answered by the court of appeals: Yes.

3. Can the Department of Natural Resources, an agency of the State of Wisconsin, threaten a licensed business with loss of its license or civil forfeiture for continued violation of a modification to the terms and conditions of the license, where the Department provided no prior notice or meaningful opportunity for the licensee to be heard on the merits of the modification as required by the due process clauses of U.S. Const. amend. XIV and Wis. Const. art. 1,§ 1?

Answered by the court of appeals: Yes.

4. If a modification to the terms and conditions of a license impairs a person's property interest, does the modification form the basis of a contested case within the meaning of § 227.01, Wis. Stats., such that the Department must comply with the contested case notice and hearing requirements of §§ 227.44, 227.45 and/or 227.51, Wis. Stats.?

Not answered by the court of appeals.

5. Does the construction and application of chs. 144 and 227, Wis. Stats., deprive Waste Management of equal protection of the law under U.S. Const. amend XIV and Wis. Const. art. I, § 1, if Waste Management has no right to a hearing under §§ 227.01, 227.44, 227.45 and 227.51, Wis. Stats., and Waste Management has no right to a hearing under § 227.42 or 144.44(3)(d), Wis. Stats.?

Not answered by the court of appeals.

* * *

ARGUMENT IN SUPPORT OF REVIEW

I. WASTE MANAGEMENT HAS A PROPERTY INTEREST IN ITS LICENSE TO CONSTRUCT AND OPERATE THE MUSKEGO SITE PURSUANT TO THE TERMS OF ITS LICENSE.

A. Waste Management Has A Property Interest In Its License.

The court of appeals blatantly erred in holding that the June 6, 1984 Modification does not deprive Waste Management of its interest in its license. The court of appeals' decision is fundamentally inconsistent with the United States Supreme Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *Ex Parte Young*, 209 U.S. 123 (1908). The Plan of Operation Modification impairs Waste Management's property interest in its license by changing the terms and conditions of its licensed business operations. The Modification impairs Waste Management's property interest because it requires the expenditure of substantial sums of money. Any failure to comply with the Modification subjects Waste Management to the possibility of substantial monetary penalties and/or license revocation.

In *Roth*, the Court described certain attributes of property interests protected by procedural due process.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id. at 577. The Court also discussed the origin of property interests, stating:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id.

The Plan of Operation for a solid waste disposal facility covers all phases of the site's life. The Plan of Operation provides the terms and conditions under which the landfill owner may construct and operate the Site. Approval of the Plan of Operation in 1977 under § 144.44(3)(c), Wis. Stats. (1977) *entitles* the applicant "to construct *and operate* the facility in accordance with the approved plan for not less than the design capacity specified in the determination of feasibility . . . ." [Emphasis supplied.] § 144.44(3)(d), Wis. Stats. (1977).

The Department's power to modify any aspect of an approved Plan of Operation is limited. The Department must establish by a clear preponderance of the credible evidence that one of three specific circumstances exists before it can require any modification. *See* § 144.34(3)(d), Wis. Stats. Section 144.44(4)(a), Wis. Stats., entitles an

operator to a license to operate as long as there is no "grievious and continuous failure to comply with the approved plan of operation under sub. (3) . . . ." Section 144.44(3)(d) thus compels the Department to issue an annual license to a site which has not exceeded its approved capacity, unless one of the three specified circumstances exists. *See Analysis by Legislative Reference Bureau*, 1977 Assembly Bill 880, (July 13, 1977).

The analysis detailed in *Information Memorandum 78-27*, "New Solid and Hazardous Waste Management Program (Chapter 377, Laws of 1977)", establishes that it was the legislature's specific intent to protect landfill facility owners from post-approval changes in their operating requirements due to technological advances or changes in the regulations promulgated by the Department. *See* p. 3. (App. 154.) Landfill facility owners are to be "guaranteed annual licensure" so long as they comply with the original Plan of Operation Approval and landfill facility owners are to be "insulated" from changes to their Plan of Operation and license due to technical advances or changes in Department regulations. *Id.* at 3, 5. (App. 154, 156.)

Chapter 144, Wis. Stats. (1977), conferred on Waste Management a property right in its license "to construct *and operate*" its landfill site. The terms of Waste Management's license to construct and operate its landfill site are set forth in the approved Plan of Operation.[2]

Waste Management does not contend that the Department has no authority to regulate its activities. The issue

---

[2]A site cannot receive a license until each and every condition of a plan of operation is approved by the Department and agreed upon by the licensee. *See* § 144.44(4)(a), Wis. Stats.

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---

[2]A site cannot receive a license until each and every condition of a plan of operation is approved by the Department and agreed upon by the licensee. *See* § 144.44(4)(a), Wis. Stats.

is whether Waste Management is entitled to any notice and hearing before site-specific (as opposed to legislative) changes are made by the Department with respect to the operation of its licensed landfill site. It is fundamental that once conferred, Waste Management's property right in its license cannot be revoked, amended or modified absent appropriate procedural safeguards, no matter what authority is reserved to the Department under the statutes. *See Loudermill*, 470 U.S. at 541.

In *Loudermill*, the Court considered what pre-termination process must be accorded a public employee who could be discharged only for cause. The Board argued that the employee's property right in continued employment was defined by and conditioned upon the legislature's choice of procedures for its deprivation. The Court expressly rejected this argument, holding:

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property— cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. *While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.* [Emphasis supplied; citations omitted.]

Loudermill at 541.

In this case, Waste Management has obtained a license to construct and operate the Muskego Site which entitles it to construct and operate the Site pursuant to the terms contained in the Plan of Operation Approval. Section 144.44(3)(d), Wis. Stats. (1977), *entitled* Waste Management to construct *and operate* the facility in accordance with the approved Plan of Operation. Like the employee in *Loudermill* who had a property right in continued employment and who could be discharged only for cause in accordance with appropriate procedural safeguards, Waste Management has a property right in its annual operating license, which cannot be impaired absent appropriate procedural safeguards. *Loudermill* expressly rejected any notion that the granting of Waste Management's property interest in its license can be conditioned upon the Department's authority to deprive it without any process whatsoever. *See Loudermill* at 541. *See also Cornelius v. LaCroix*, 631 F.Supp. 610 (E.D. Wis. 1986).

The court of appeals' decision in this case holds that Waste Management's interest in its license does not merit due process protection because, in the court's determination, the Plan of Operation Modification does not relate to conditions of construction. This analysis exemplifies the "bitter with the sweet" approach expressly rejected in *Loudermill*. The court of appeals has held that Waste Management's property interest in its license is defined by and conditioned upon the Department's authority to change Waste Management's operation of the site without notice or a hearing of any kind. The court of appeals' holding directly contradicts *Loudermill*.

B. The Department Deprived Waste Management Of Due Process Of Law By Failing To Provide Prior Notice Of Its Contemplated Action.

Once it is determined that Waste Management has a constitutionally protected property interest in its license to construct and operate the Muskego Site which has been impaired by the Plan of Operation Modification, the question whether the Department provided appropriate procedural safeguards must be addressed. *See, e.g., Loudermill,* 470 U.S. at 541. In this case, Waste Management was deprived of due process because no prior notice of the Department's contemplated action was provided.

A review of the administrative record filed in this case reveals that no notice whatsoever was provided to Waste Management of the Department's contemplated action. In the United States District Court the Department *stipulated* that the Department did not provide Waste Management with any notice or hearing prior to or subsequent to issuing the Modification. (R:9; App. 144.)

As a matter of constitutional due process, the Department was required to inform Waste Management of its intention to issue the Plan of Operation Modification, its proposed factual findings and the basis for those findings *prior to* issuing the Modification. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950); *Morgan v. U.S.,* 304 U.S. 1, 18-19 (1937); *Gonzales v. U.S.,* 348 U.S. 407 (1954). Without such information and the opportunity to challenge the merits of proposed modifications prior to their issuance, Waste Management can never effectively challenge the modifications on the merits.

C. The Department Deprive Waste Management Of Due Process Of Law By Failing To Provide Any Type Of Hearing.

A review of the administrative record in this case does not demonstrate any type of hearing whatsoever *prior* to the Department issuing the Modification. Moreover, the Department stipulated in the federal court that, "The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing." (R:9; App. 144.) The failure to provide Waste Management with an opportunity to be heard is a deprivation of Waste Management's right to due process under Wis. Const. art. I, § 1; U.S. Const. amend. XIV; and as established by the case law.

D. The Threat Of Enforcement Constitutes A Separate Due Process Deprivation Suffered By Waste Management.

In *Ex Parte Young,* 209 U.S. 123 (1908), the Court considered a state statute enabling an administrative agency to establish a schedule of railroad freight rates. The railroads were not provided any notice or opportunity to be heard before the rates became effective and enforceable by fines and penalties. If the railroads wished to assert that the rates deprived them of their property without just compensation, their only recourse was to suffer a criminal indictment and to contest the rates in the ensuing criminal prosecution. The Court found the statutory framework to be a violation of the railroads' right to procedural due process.

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprison-

> ment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Id. at 147. The Court held that statutory provisions "imposing such enoromous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates." *Id.* at 148. The Court reaffirmed this rule in *St. Louis, Iron Mountain and Southern Railway Co. v. Williams*, 251 U.S. 63, 64-65 (1919). As a matter of due process of law, agency action must be subject to a meaningful opportunity to challenge the agency decision on the merits *before* enforcement or the accrual of penalties.

In this case, Waste Management has been forced to litigate the validity of the Plan of Operation Modification while under the threat of penalties. The Modification is a final, enforceable decision which was issued without prior notice and an opportunity for hearing. The court of appeals' decision authorizes the Department to reissue its Modification without providing *prior* notice and a hearing. Waste Management, therefore, has suffered at least the same due process deprivation recognized in *Young*. Indeed, the deprivation is worse because, unlike *Young*, in a Wisconsin enforcement action, the justiciable issues are limited to: (1) whether Waste Management has complied with the modifications; and (2) the appropriate penalty for noncompliance. Substantive challenges to the merits of the Modification or the procedures utilized in its issuance are not contestable matters in an enforcement action.

* * *

EXCERPTED PORTIONS OF PETITIONER'S APPELLANT'S BRIEF FILED IN THE STATE OF WISCONSIN COURT OF APPEALS, DISTRICT I.

STATE OF WISCONSIN
COURT OF APPEALS,
DISTRICT I

WASTE MANAGEMENT OF WISCONSIN, INC., a Domestic corporation,

Petitioner-Appellant,

v. Docket No. 86-1934

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent.

APPELLANT'S BRIEF AND APPENDIX

Appeal from a Final Order entered in the Circuit Court for Milwaukee County, Case No. 644-065, the Honorable Joseph P. Callan, Circuit Judge for Milwaukee County, presiding.

FRIEBERT, FINERTY & ST. JOHN, S.C.
Robert H. Friebert
William S. Roush, Jr.
Caren B. Goldberg

Attorneys for Petitioner-Appellant

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* * *

QUESTIONS PRESENTED

Question No. 1: Is the reviewing court required to review the administrative record and separately consider all of the statutory and constitutional violations committed by the Department of Natural Resources in issuing its final decision?

Answered by the trial court: No.

Question No. 2: Does the administrative record demonstrate that the Department of Natural Resources provided notice of its contemplated action in a manner sufficient to meet the requirements of due process under the 14th Amendment to the United States Constitution?

Not answered by the trial court.

Question No. 3: Does the administrative record demonstrate that the Department of Natural Resources provided a hearing to Waste Management sufficient to meet the minimum requirements of due process under the 14th Amendment to the United States Constitution?

Not answered by the trial court.

Question No. 4: Do the contested case requirements of §§ 227.01, 227.07 and 227.14, Wis. Stats., apply to the final decision issued by the Department of Natural Resources?

Answered by the trial court: No.

Question No. 5: Did the Department of Natural Resources comply with the notice requirement of § 227.07(2), Wis. Stats.?

Answered by the trial court: Not applicable.

Question No. 6: Did the Department of Natural Resources comply with the hearing requirements of § 227.01 and § 227.07, Wis. Stats.?

Answered by the trial court: Not applicable.

Question No. 7: Was Waste Management entitled to a judgment in its favor setting aside and vacating or reversing and remanding the modification based upon the Department of Natural Resources' violation of § 227.10, Wis. Stats.?

Answered by the trial court: No.

Question No. 8: As construed by the trial court, do the provisions of Chapter 144 and Chapter 227, Wis. Stats., deprive Waste Management of equal protection of the law?

Not answered by the trial court.

* * *

III. THE DEPARTMENT OF NATURAL RESOURCES DEPRIVED WASTE MANAGEMENT OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO PROVIDE NOTICE OF ITS CONTEMPLATED ACTION.

In *Waste Management of Wisconsin, Inc. v. State of Wisconsin Department of Natural Resources*, 128 Wis. 2d

59, 381 N.W.2d 318 (1986), the Supreme Court determined that Waste Management has a property interest in its license to operate its landfill sites which merits due process protection. *Id.* at 77. Modifications to Waste Management's Plan of Operation constitute a deprivation of Waste Management's interest in its license to the extent that the modifications alter construction requirements that were contained in the original approval of the Plan of Operation. *Id.* at 78.

The modification to Waste Management's Plan of Operation in this case constitutes a deprivation of Waste Management's interest in its license to operate the Muskego Site because the modification alters requirements relating to construction that were contained in the original approved Plan of Operation. The modification to Waste Management's Plan of Operation for the Muskego Site deprives Waste Management of its interest in its license because "[u]nless Waste Management complies with the DNR's requirements, it risks denial, suspension or revocation of its license under sec. 144.44(4)(a), Wis. Stats." *See id.* at 90.

Prior notice of contemplated agency action is a fundamental requirement of constitutional due process whenever a property interest is impaired.

> Due process dictates that a deprivation of a protected interest ". . . be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process re-

quirement." *Cleveland Board of Education v. Loudermill*, 53 U.S.L.W. 4306, 4309 (March 19, 1985).

Id. at 78.

The fundamental requisite of due process of law is the opportunity to be heard, *before* any deprivation of any significant property interest occurs. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). However, this right to be heard is of no avail unless one is informed that the matter is pending. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

In order to meet the elementary requirements of constitutional due process in any proceeding which is to be accorded finality, the notice of contemplated agency action must be reasonably calculated under all the circumstances to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections. *Mullane*, 339 U.S. at 314. The notice must be of such nature as to reasonably convey the required information and it must afford a reasonable time for those interested to make their appearance. *Id.*

According to the foregoing cases, as a matter of constitutional due process, the DNR was required to inform Waste Management of its intention to issue the modification to the Plan of Operation and provide Waste Management with sufficient information to make a sensible response *prior to* the issuance of the modification. Without the opportunity to challenge the merits of proposed modifications prior to the issuance of such modifications, Waste Management can never challenge the modifications on the merits. After a modification is issued, the only determina-

tions to be made concern matters of enforcement and compliance. *See* § 144.44(3)(e), Wis. Stats.

A review of the administrative record in this case reveals that no notice whatsoever was provided to Waste Management of the DNR's contemplated action. In fact, in a stipulation filed in the United States District Court for the Eastern District of Wisconsin, R:9; App. 111-21, the DNR stipulated that in connection with the very same modification to the Plan of Operation at issue in this case, the Department did not provide Waste Management with any notice or hearing prior to or subsequent to issuing the modiifcation.

> 24. On June 6, 1984, the Department sent the plaintiff another letter which the Department intended to be a modification of the plaintiff's existing approved Plans of Operation. A copy of the letter is filed herewith as Exhibit K. *The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing.* [Emphasis added].

R:9; App. 117.

In contrast to the cases considered by the Wisconsin Supreme Court in *Waste Management*, the DNR has stipulated here that it provided *no notice* and *no hearing* in connection with the modification to the Plan of Operation. Not only does this fact distinguish this case from the *Waste Management* case, it establishes conclusively that Waste Management's due process rights were violated.

At the June 23, 1986 proceedings, Mr. Friebert challenged Assistant Attorney General Sinderbrand to mark as an exhibit the document which provided notice to Waste

Management of the contemplated agency action prior to its being finalized. R:16, p. 9-10. Rather than pointing to any document, Assistant Attorney General Sinderbrand argued, "[I]n truth and fact, the Stipulation does provide that there was no notice and hearing just like in the cases before the Wisconsin Supreme Court. We agreed and argued that, in the context of the notice and hearing provisions of Chapter 227, we did not fulfill that requirement. What the Supreme Court determined as a matter of law constituted notice, and hearing was the interchange that went on in that case . . . ." R:16, p. 18.[6] Remarkably, the DNR took the position that the Supreme Court does not require that the DNR fulfill the constitutional requirement of providing notice of its contemplated action. This position is absolutely untenable.

On this appeal, Waste Management renews its challenge to the DNR to produce and to show to the appellant and to the court of appeals the document which it claims provided notice of the DNR's contemplated action to modify Waste Management's Plan of Operation. We predict that the DNR will be unable to produce such a document and will feebly attempt to argue around the nonexistence of such a document. In other cases, the DNR has attempted to point to the final decision of the DNR under review as the notice. If that is attempted here, this case should be summarily reversed. Irrespective of

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[6]Assistant Attorney General Sinderbrand's argument on this point is misleading. Nowhere does the Court in *Waste Management of Wisconsin, Inc. v. State of Wisconsin Department of Natural Resources*, 128 Wis. 2d 59, 381 N.W.2d 318 (1986), state that notice was provided let alone engage in any discussion regarding the form or contents of such notice.

any other ground for reversal, judgment should be entered in favor of Waste Management due to the absence of the notice required by constitutional due process. §§ 227.20(4), (8) and (9), Wis. Stats.

IV. THE DEPARTMENT OF NATURAL RESOURCES DEPRIVED WASTE MANAGEMENT OF DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY FAILING TO PROVIDE WASTE MANAGEMENT WITH ANY TYPE OF HEARING.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case.

Mullane, 339 U.S. at 313. The right to prior notice and an opportunity to be heard is not a matter of administrative or legislative grace but is a constitutional guarantee. *Loudermill*, 470 U.S. at 541.

> A petitioner must have some means, *before* an agency issues a final order, of engaging in a reasonably focused dialogue with the agency concerning the major points at issue . . . An opportunity to address the government's position and the information upon which that position rests must be afforded, whether by the written or the spoken word. (Emphasis added.)

Zotos International, Inc. v. Kennedy, 460 F.Supp. 268, 279 (D.D.C. 1978).[7]

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[7]In *Zotos*, the federal court invalidated a trade secret determination by the Food and Drug Administration because the

(Continued on following page)

In *Waste Management, supra,* the Wisconsin Supreme Court held that a meaningful opportunity to be heard is a fundamental element of constitutional due process necessary to protect Waste Management's property interest in its license and its Plan of Operation. The due process clause requires that a person be given an "opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Waste Management,* 128 Wis. 2d at 80 quoting *Cleveland Board of Education v. Loudermill,* 470 U.S. at 546.

To determine the appropriate form of hearing, the Supreme Court balanced the following competing interests at stake:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

Waste Management, 128 Wis. 2d at 78-79. The Supreme Court further stated:

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FDA failed to disclose the basis of its proposed trade secret determination and the authorities it relied upon, such that Zotos had no reasonable opportunity to address the authorities and respond. The same problem has occurred in this case. Waste Management had no opportunity to address the Department's analysis of the materials relied upon by the DNR or any of the reasoning employed by the DNR prior to the DNR's final decision because it had no notice of the DNR's intent to issue the modification.

> The constitutional guarantee of due process offers Waste Management an opportunity to challenge the reasoning of the DNR's decisions and thereby assures Waste Management that the DNR will act within its statutory authority in exercising its supervisory and regulatory powers.

Id.

In a similar case, the United States District Court considered a Wisconsin statute under which the Wisconsin Department of Health and Social Services took administrative action similar to the DNR's issuance of the modification to the Plan of Operation in this case. *See Ross v. State of Wisconsin Department of Health and Social Services*, 369 F.Supp. 570 (E.D. Wis. 1973). In *Ross* a three-judge panel held the state statutes and administrative action to be unconstitutional because the Department of Health and Social Services failed to provide any prior notice or meaningful opportunity to be heard. The court held that the following "minimum" elements were necessary to comply with constitutional due process:

> These minimum elements are (a) timely written notice of the claimed violations; (b) disclosure to the nursing home proprietor of the evidence against him; (c) the right to be represented by retained counsel; (d) an opportunity to be heard in person and to present witnesses and documentary evidence; (e) an opportunity to confront and cross-examine adverse witnesses; (f) a hearing body which is "neutral and detached" in that it does not include persons responsible for investigations of nursing homes or persons who assert charges based on such investigations; and (g) a written statement by the fact finders as to evidence relied on and reasons for the action taken.

Id. at 572.

Upon its examination of the administrative record in *Waste Management, supra*, the Wisconsin Supreme Court found that the administrative record demonstrated an exchange of detailed comments sufficient to meet the minimum requirements of due process if it was supplemented with appropriate judicial review. The court based its determination upon a substantive review of the administrative record in that case and its substantive analysis of the hearing afforded under the requirements of due process.

> Here, Waste Management engaged in correspondence with the DNR on several occassions detailing its reasons for believing that the DNR's requirements were unwarranted. In responding to Waste Management's concerns, the DNR offered reasons in support of its modifications.

Id. at 80.

This case is different. The administrative record in this case is different from the administrative record filed in the *Waste Management* case. The letters written to and by Waste Management in this case are different from the letters written to and by Waste Management in the *Waste Management* case. Moreover, the DNR stipulated in the federal court that, "The Department did not provide the plaintiff with notice or a hearing prior to the modification, nor did it provide a subsequent hearing." R:9; App. 117.

The administrative record in this case unequivocally establishes that Waste Management was not provided with any type of hearing whatsoever prior to the DNR's issuance of the modification. Nowhere in the administrative record in this case is there any evidence of the opportunity for comment prior to final agency action after notice of

contemplated agency action that the Wisconsin Supreme Court seemed to find satisfied the minimum elements of constitutional due process in *Waste Management*. Because the issuance of the modification constitutes final agency action, *see Waste Management*, 128 Wis. 2d at 90, the failure to provide Waste Management with an opportunity to be heard is a deprivation of Waste Management's right to due process as established by *Waste Management*, *Mullane*, *Loudermill*, *Ross* and *Zotos*, *supra.*, such that the modification to the Plan of Operation must be reversed pursuant to § 227.20(4), (8) and (9), Wis. Stats.

* * *

VI. WASTE MANAGEMENT WAS ENTITLED TO JUDGMENT GRANTING IT APPROPRIATE RELIEF.

Waste Management submits that the modification to the Plan of Operation in this case should be declared invalid, null and void *ab initio* and that the decision of the DNR should be set aside, reversed and vacated pursuant to § 227.20(4), (8) and (9), Wis. Stats. Furthermore, the DNR should be enjoined from any further action until it provides notice and an opportunity to be heard as required by the United States Constitution, the Wisconsin Constitution and ch. 227, Wis. Stats. The trial court's remand to the DNR for findings of fact and conclusions of law in accordance with § 227.10, Wis. Stats., will not cure the DNR's violations of the statutory notice and hearing requirements of §§ 227.01, 227.07 and 227.14, Wis. Stats. The DNR's violations of the statutory and constitutional requirements can only be cured by setting aside, reversing and vacating the modification to require the DNR to start

over again from the beginning with the issuance of a proper notice of its contemplated action.

Moreover, as demonstrated by the "Request for Judicial Notice of Adjudicative Facts," R:9, the DNR is seeking enforcement and/or penalties with respect to alleged violations of modifications to Plans of Operations in similar actions. There is nothing to prevent the DNR from attempting the same type of enforcement in this case.

The Department's attempt to enforce the invalid modifications to the Plan of Operation is equally as egregious as the conduct that was condemned in *Ex parte Young*, 209 U.S. 123 (1908). In *Young*, the Supreme Court considered a state statute enabling an administrative commission to establish a schedule of railroad freight rates. The railroads were not granted a hearing before the commission; nor was there a provision for judicial review as to the reasonableness of the rates imposed. If the railroads wished to assert that the rates deprived them of their property without just compensation, their only recourse was to suffer a criminal indictment and to contest the adequacy of the rates in the ensuing criminal prosecution. The Court found the statutory framework to be a violation of the railroads' right to procedural due process.

> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the leigslation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

Id. at 147. The Court held that statutory provisions "imposing such enormous fines and possible imprisonment as

a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates." *Id.* at 148.

The Supreme Court further clarified this rule in *St. Louis, Iron Mountain and Southern Railway Co. v. Williams*, 251 U.S. 63 (1919).

> [I]mposition of severe penalties as a means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunities afforded . . . for safety testing in an appropriate judicial proceeding, the validity of the rate . . . before any liability for the penalty attaches.

Id. at 64-65. Under the foregoing cases, as a matter of due process of law, agency action must be subject to meaningful judicial review before enforcement or the accrual of penalties.

In this case Waste Management has already suffered the due process deprivation recognized in *Young* by being compelled to litigate the validity of the modification under the threat of penalties. Nonetheless, Waste Management continued the litigation in the recent *Waste Management* case, substantially prevailed on the merits, and obtained the Wisconsin Supreme Court's ruling that the modifications were invalid. Unless Waste Management is afforded an opportunity for hearing prior to agency action, Waste Management is forever precluded from challenging the merits of the modification. Once the modification issues, the only questions to be determined relate to matters of enforcement and compliance; substantive challenges to the modification or the procedures utilized in its issuance are no longer contestable matters.

The Court in this case should declare the modification to be void *ab initio* to avoid a further due process deprivation due to the threat of enforcement or penalties for violation of the admittedly invalid modification. The existing threat of enforcement is in contravention of Waste Management's due process rights as established by the *Young* line of cases. If the modification is enforced, Waste Management will be placed in an even worse position than the dilemma forbidden by *Young* and its progeny. Waste Management will be threatened with forfeitures even *after* its rights have been vindicated in litigation. In this case, the relief available under § 227.20(8) and (9), Wis. Stats., is appropriate to correct the DNR's statutory violations and to prevent a further deprivation of Waste Management's rights to due process of law. *Cf. State ex rel. Commissioners of Public Lands v. Anderson*, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973); *In re F.R.W.*, 61 Wis. 2d 193, 200, 212 N.W.2d 130 (1973), *cert. denied*, 416 U.S. 974 (1974); *State v. Olson*, 127 Wis. 2d 412, 420, 380 N.W.2d 375 (Ct. App. 1985).

* * *

STATE OF WISCONSIN : MILWAUKEE COUNTY
CIVIL DIVISION
CIRCUIT COURT :

JUDGE JOSEPH P. CALLAN BR. 30
644665

WASTE MANAGEMENT OF WISCONSIN, INC., a domestic corporation,

Petitioner,

vs.

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

PETITION FOR JUDICIAL REVIEW OF AGENCY DETERMINATION PURSUANT TO CHAPTER 227, WIS. STATS.

(Filed July 13, 1984)

The petitioner, Waste Management of Wisconsin, Inc., by its attorneys, Friebert, Finerty & St. John, hereby respectfully petitions and shows to the Court as follows:

1. The petitioner, Waste Management of Wisconsin, Inc. is a Wisconsin corporation with its offices and principal place of business located at 3333 North Mayfair Road, City of Milwaukee, County of Milwaukee, State of Wisconsin.

2. The respondent, State of Wisconsin Department of Natural Resources, is an independent state agency created under § 15.34, Wis. Stats., which has as one of its responsibilities the licensure and regulation of solid waste disposal sites and hazardous waste disposal sites pursuant to Ch. 144, Wis. Stats.

3. The petitioner is the operator of a sanitary landfill site located in Waukesha County, State of Wisconsin, commonly known as the Muskego Sanitary Landfill, and such sanitary landfill site is operated under licenses issued by the Wisconsin Department of Natural Resources, License Nos. 0141 and 2895. The sanitary landfill site is also operated under an Approved Plan of Operation, the terms of which are incorporated into the operating licenses of the petitioner.

4. Pursuant to Ch. 144, Wis. Stats. (1975), on February 4, 1977, the Wisconsin Department of Natural Resources issued a Plan of Operation Approval for the construction and operation of the Muskego Sanitary Landfill, and thereafter the Wisconsin Department of Natural Resources issued operating licenses for the Muskego Sanitary Landfill, License No. 0141.

5. On November 28, 1979, pursuant to § 144.44(3)(c), Wis. Stats. (1977), the Wisconsin Department of Natural Resources issued a second Plan of Operation Approval for the construction and continued operation of the Muskego Sanitary Landfill, and thereafter the Wisconsin Department of Natural Resources has continuously issued operating licenses for the Muskego Sanitary Landfill under License No. 2895.

6. Section 144.44(3)(d), Wis. Stats. (1977), provides as follows:

> *Approval.* Approval under par. (c) shall entitle the applicant to construct and operate the site in accordance with the approved plan for not less than the design capacity specified in the determination of site feasibility, unless the department establishes by a clear preponderance of the credible evidence that:

1. The site is not constructed in accordance with the approved plan;

2. The site poses a substantial hazard to public health or welfare; or

3. In-field conditions, not disclosed in the feasibility report or plan of operation, necessitate modifications of the plan to comply with standards in effect at the time of plan approval under s. 144.43 or, if applicable, s. 144.62.

7. Section 144.44(3)(d), Wis. Stats. (1981-82), provides as follows:

Approval. Approval under par. (c) entitles the applicant to construct the facility in accordance with the approved plan for not less than the design capacity specified in the determination of feasibility, unless the department establishes by a clear preponderance of the credible evidence that:

1. The facility is not constructed in accordance with the approved plan;

2. The facility poses a substantial hazard to public health or welfare; or

3. In-field conditions, not disclosed in the feasibility report or plan of operation, necessitate modifications of the plan to comply with standards in effect at the time of plan approval under s. 144.435 or, if applicable, s. 144.62.

8. Section 144.44(4)(a), Wis. Stats. (1981-82), provides that the Department of Natural Resources can:

[D]eny, suspend or revoke an operating license for failure to pay fees required under ss. 144.43 to 144.47 or for grievous and continuous failure to comply with the approved plan of operation under sub. (3) or, if no plan of operation exists with regard to the facility, for grievous and continuous failure to comply with the standard adopted under s. 144.435.

9. Under § 144.435, Wis. Stats., the Wisconsin Department of Natural Resources is authorized to promulgate rules with respect to the construction and operation of sanitary landfill sites:

> The department shall promulgate rules establishing minimum standards for the location, design, construction, sanitation, operation and maintenance of solid waste facilities. Following a public hearing, the department shall promulgate rules relating to the operation and maintenance of solid waste facilities as it deems necessary to ensure compliance and consistency with the purposes of and standards established under the Resource Conservation and Recovery Act, except that the rules relating to open burning shall be consistent with s. 144.436. The rules promulgated under this subsection shall conform to the rules promulgated under sub. (2).

10. According to the provisions of § 144.44(3)(c), Wis. Stats., a determination made or action taken by the Wisconsin Department of Natural Resources respecting a Plan of Operation is to be based upon standards previously promulgated by the Department under § 144.435, Wis. Stats.:

> The determination of the department shall be based upon compliance with the standards established under s. 144.435 or, in the case of hazardous waste facilities, with the rules and standards established under s. 144.62. An approval may be conditioned upon any requirements necessary to comply with the standards.

11. On June 14, 1984, Waste Management of Wisconsin, Inc. received a letter dated June 6, 1984, with an uncancelled metered postage sticker indicating that the postage meter had been set to read June 12, 1984, at the time the postage was placed on the letter. Attached hereto